

# **Guideline for Implementing Environmental Penalties (Ontario Regulations 222/07 and 223/07)**

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Please note that the regulations will take precedence where a conflict or ambiguity exists between this Guideline and the requirements of the regulations. While every effort has been made to ensure the accuracy of the information contained within this Guideline, it should not be construed as legal advice.

This Guideline pertains to contraventions that occur on or after October 31, 2011, the day subsection 2 (79) of Schedule 7 to the *Open for Business Act, 2010* came into force.

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## Part 1: Overview

*Part 1 introduces Ontario's framework for environmental penalties. Environmental penalties are an abatement tool that will help induce violators to take swift corrective action when a violation occurs in order to reduce or prevent harm to the environment or human health. Environmental penalties also function to negate any monetary benefits of non-compliance. The scope of the environmental penalty framework is discussed and the process leading to the issuance of an environmental penalty order is described step-by-step.*

### 1.1 Environmental Penalties in Context

The Ministry of the Environment (“ministry”) is responsible for developing, enforcing and providing education and outreach on Ontario’s environmental laws. The purpose of Environmental Penalty orders (“EP orders”) is to protect the environment by inducing companies to comply with environmental regulations and take swift remedial action in the event of a spill, discharge, or other environmental violation.

The ministry expects all companies and individuals to comply with all the environmental laws that apply to them. When one of those laws has not been complied with, the primary objective of the ministry’s compliance and enforcement program is to see that those responsible act quickly to deal with the impacts of a violation, return to compliance with environmental laws as soon as practicable, and take every practical measure to prevent the recurrence of the incident. The terms “violation” and “contravention” are used interchangeably and have the same meaning in this guideline.

EP orders were introduced through the *Environmental Enforcement Statute Law Amendment Act* (Bill 133), passed in June 2005. This legislation amended the *Environmental Protection Act* (“EPA”) and the *Ontario Water Resources Act* (“OWRA”), establishing the overall framework for EP orders. O.Reg. 222/07 made under the EPA and O.Reg. 223/07 made under the OWRA provide details of how, when and to which types of violations EP orders will be applied. Both regulations contain the same concepts so for ease of reference this Guideline will mainly refer to the O. Reg. 222/07 (the “EP Regulation”).

Basically, EP orders are monetary penalties that companies may be required to pay if they have violated a requirement under the OWRA or EPA that is specified in the EP Regulation. Because the primary goal of EP orders as an abatement tool is to encourage quick and effective action to restore, reduce or prevent harm to the environment or human health, there are ways for companies to have the amount of the penalty adjusted, based on actions they took before, during and after an incident.

The ministry’s response to a violation is determined in accordance with the document entitled, “Compliance Policy: Applying Abatement and Enforcement Tools” (May 2007)

as amended from time to time, (“Compliance Policy”). The Compliance Policy includes an Informed Judgement Matrix (“IJM”) which provides guidance regarding appropriate responses to violations. Violations are assessed on a case-by-case basis to determine which abatement and/or enforcement tool is most appropriate for obtaining quick action to mitigate the effects of a violation, achieve compliance with environmental laws, and improved environmental performance in both the short and long term.

As set out in the purpose section (s.1) of the EP Regulation, EP orders are to be assessed in a manner that will encourage companies to prevent things from happening that harm or have the potential to harm the environment or human health. If an incident does occur, it is the aim of EP orders to encourage companies to return to compliance quickly and take steps to ensure the violation does not happen again. In addition, the amount of the EP order must be consistent with promoting internal discipline among regulated persons (see s. 7(2) of the EP Regulation and Chapter 2.1 of this Guideline). The procedures set out in this Guideline will be used to determine a penalty amount that is appropriate to attain these purposes.

Phase I violations are the major violations and were subject to EP Regulations on August 1, 2007 (Table 2 to the EP Regulation and Appendix 2 of this Guideline). Phase II violations are minor violations and were subject to EP Regulations on December 1, 2008 (Table 2 to the EP Regulation and Appendix 2 of this Guideline). Also, see Tables in Chapter 2.2.1 for overview of types and phases and Appendix I for overview of phases.

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## 1.2 Scope of Environmental Penalties

The EP framework, set out in the EP Regulations and legislation, is characterized by the following key parameters, which will be discussed in more depth later in this Guideline:

- EP orders apply only to a prescribed class of “regulated persons”<sup>1</sup>. **(s. 3)**
- EP orders apply to violations related to water and land and are phased in over time with the first phase coming into effect on August 1, 2007 and the second phase coming into effect on December 1, 2008. **(s. 4 and Table 2)** (see also Appendices 1 and 2 to this Guideline)
- Advanced notice of the intention to issue an EP order is given and there are opportunities to discuss the violation and provide additional information to the ministry before a final EP amount is determined. **(s. 5 and s. 6)**
- The amount of the EP order is comprised of a “gravity component” which reflects the seriousness of the violation and any monetary benefit the Director believes the violator acquired as a result of the violation. **(s. 7 and s. 8)** The criteria for determining seriousness are based on the specific violation and are set out in the regulation. **(ss. 10 to 15)**

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<sup>1</sup> Note that regulated person is defined in section 1 of the EPA to mean, in general terms, a person required to hold an approval.

- Factors that can affect the gravity component of the EP order include: the plant’s EP order and conviction history, membership in Ontario’s Environmental Leaders (“OEL”) program, the extent of delay in complying with the requirement that was violated, the extent of the deviation from the requirement, and the presence of a toxic substance in limit exceedances or spills/discharges. **(s. 9)** (see also Appendix 3 to this Guideline)
- Modifiers may reduce the gravity component up to 20% for the preventative steps and 10% for mitigative steps. **(s. 16)** (see also Appendix 4 to this Guideline)
- A reduction of 5% will be made if the plant has an audited environmental management system (“EMS”) in place at the time of the violation that meets regulatory requirements. **(s. 17)**.
- Entering into a Director-approved settlement agreement can lead to a reduction in the EP amount payable if the regulated person agrees to make an investment in an environmental plant-based project – a ‘beyond compliance project’ – that aims to yield environmental and/or human health benefits. **(s. 18)**
- A cap of a maximum total daily penalty not to exceed \$100,000 per violation is set out in s. 182.1(5) of the EPA and s. 106.1(5) of the OWRA. In addition, the regulation sets out the following caps:
  - Failure to report violations are capped at \$100,000. **(s. 9(3))**
  - Phase II violations are capped at the lesser of 180 days or \$60,000. **(s. 9(4))**
- An EP order cannot be issued for a violation that is either 12 months past the date that it occurred, or the date on which the evidence of the violation first came to the attention of the Director or a Provincial Officer. **(s. 182.1(8) of the EPA and s. 106.1(8) of the OWRA)**

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### 1.3 Regulated Persons Subject to Environmental Penalties (s. 3)

Section 3 of the EP Regulation sets out the details of who is a “regulated person” for the purposes of issuing an EP order. A “regulated person” is defined in the EPA to mean, in general terms, a person who belongs to a prescribed class of persons and who is required to hold an approval. The EP Regulation prescribes the class of persons as persons who own or operate a plant set out in s. 3. A person required to hold an approval will generally be a corporation. Where the regulated person is a corporation, EP orders will only be issued to the corporation, not to individuals within the corporation (e.g. not to officers, directors, employees or agents). This includes plants:

- Listed in Table 1 of the EP Regulation.
- Described in s. 3 of O. Reg. 560/94 (Effluent Monitoring and Effluent Limits – Metal Mining Sector).

- That discharge contaminated effluent to a surface watercourse or private sewage works and meet the criteria set out in s. 3(1)(c) that correspond to the following Municipal Industrial Strategy for Abatement (“MISA”) sectors: electric power generation; industrial minerals; inorganic chemical; iron and steel manufacturing; metal casting; organic chemical manufacturing; petroleum; and pulp and paper.

Note that plants captured by s. 3(1)(c) that discharge effluent only to a publicly-owned sewage treatment plant would not be subject to the EP Regulation. However, plants that have their effluent processed by a third party privately-owned sewage works would be subject to EPs.

There are two circumstances where a regulated person may cease to be a “regulated person” under the EP Regulation (i.e. cease to be subject to EP orders). These two circumstances are set out in s. 3(3) and, in general terms, are if a plant:

1. qualifies for certain exemptions from the requirement to have an Environmental Compliance Approval under s. 53(6) of the OWRA (e.g. a plant becomes closed-loop or only discharges to a publicly-owned sewage treatment plant); or
2. permanently ceases all operations and activities that correspond to those carried out by the MISA sectors.

Under s. 53(6) of the OWRA, the requirement to have an Environmental Compliance Approval does not apply,

- to a sewage works from which sewage is not to drain or be discharged directly or indirectly into a ditch, drain or storm sewer or a well, lake, river, pond, spring, stream, reservoir or other water or watercourse; and
- to a privately-owned sewage works designed for the partial treatment of sewage that is to drain or be discharged into a sanitary sewer.

If a “regulated person” can demonstrate that its plant meets the criteria in s. 53(6)(a) or (b) of the OWRA, it may notify the Director in writing under s. 3(3) of the EP Regulation that it should no longer be a regulated person. Similarly, if the regulated person permanently ceases all MISA-related activities and operations described in s. 3(1)(c), it may notify the Director in writing under s. 3(3) of EP Regulation that it should no longer be a regulated person.

If circumstances change and the plant becomes subject to s. 53(1) OWRA approval requirements or meets criteria in s. 3(1)(c) of the EP Regulation then the plant will once again be a regulated person.

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## **1.4 Types of Violations Subject to Environmental Penalties (s. 4)**

Column 4 of Table 2 to the EP Regulation indicates that implementation occurred in two phases: Phase I commenced on August 1, 2007 and Phase II commenced on December 1, 2008. Phase I violations primarily related to unlawful discharges to water or land, such as a spill that violates s. 14 of the EPA or s. 30(1) of the OWRA (the general pollution prohibitions). Phase II included other violations such as those related to constructing works, conditions of operations, sampling and reporting and record keeping. (See also, Appendices 1 and 2 to this Guideline and Tables in Chapter 2.2.1)

## 1.5 Environmental Penalty Process Step-by-Step

A summary of the steps used to issue an EP order and timeline are described below. More detail on individual elements of the process is provided in subsequent chapters of the Guideline. Refer to Chapter 3 for a more in-depth discussion of the EP order process.

The Environmental Penalty Process Step-by-Step	Timeline
<p><b>STEP 1: Environmental Penalty Notice of Intention (s. 5 of the EP Regulation)</b></p> <p>The ministry issues a notice of intention (“NOI”) to issue an EP order which identifies the violation subject to an EP order, the estimated range of the gravity component, the estimated amount of the monetary benefit component, if any, and offers an opportunity for the regulated person to provide information to the Director to consider before finalizing the EP order. The NOI also sets out the right to seek reductions to the proposed estimated penalty as set out in ss. 5 and 6 of the EP Regulation. Each violation involved in an incident may be subject to a separate penalty; however, they may be consolidated into one EP order.</p> <p>If circumstances around the incident change, the Director may amend an NOI after it has been issued, giving the regulated person written notice of the amendment.</p>	<p><b>1 to 60 days after Ministry aware of incident</b></p>
<p><b>STEP 2: Environmental Penalty Review Period (s. 6 of the EP Regulation)</b></p> <p>If the regulated person wishes to make submissions to the Director before the Director issues the EP order, the regulated person must request a review by the Director in writing. In the request the regulated person should provide any information regarding the facts and circumstances of the incident and the actions taken before, during, and after the incident. The regulated person must make the request for review within 15 days of the date on the NOI (or any amendment) or within the period of time agreed to by the Director in writing (see s. 6 of the regulation). The NOI should be served via a means that allows for same-day delivery (e.g. personal service, fax service or e-mail service) in order to allow the regulated person the full 15 days to respond.</p> <p>If there is no request for review from the regulated person within the specified timeframe, an EP order may be issued for the amount determined by the Director in accordance with the regulation (Step 4).</p> <p>Upon a request for review and prior to the issuance of an EP order, the regulated person may request to meet with the Director and/or ministry staff to further discuss the written submission. The EP order amount may reflect adjustments to the penalty amount based on the information provided, including any reductions made to the penalty as a result of the preventive and mitigative measures taken in relation to the violation.</p>	<p><b>Within 15 days of NOI being issued as per regulation</b></p>

<p><b>STEP 3: Settlement Agreement Option (s.182.1(9) of the EPA, s. 106.1(9) of the OWRA and s. 18 of the EP Regulation)</b></p> <p>The regulated person may ask to enter into a settlement agreement with the Director. A settlement agreement may require:</p> <ul style="list-style-type: none"> <li>• an investment in a facility-based pollution prevention or pollution reduction project that aims to yield human health or environmental benefits beyond those required by any environmental law – referred to as ‘beyond compliance projects’ (“BCPs”). This may lead to a reduction in the EP amount to be paid, with certain limitations</li> <li>• other abatement actions required by the regulated person to come into compliance with legal requirements that are the subject of the EP order. Because these are steps taken to achieve compliance, their inclusion in a settlement agreement does not lead to a reduction in the assessed EP amount.</li> </ul> <p>It is at the Director’s discretion as to whether he/she enters into a settlement agreement with a regulated person, and whether the results of the settlement agreement negotiations are acceptable, including the timeliness of the negotiations and the scope and value of the proposed BCP, as applicable.</p> <p>If a settlement agreement is reached, the Director would only agree to a settlement agreement if the regulated person agrees as part of the agreement not to appeal the EP order giving rise to the settlement agreement.</p> <p>Final settlement agreements will be made available to the public through postings on the <i>Environmental Bill of Rights</i> (“EBR”) Registry. (s. 182.1(10) of the EPA and s. 106.1(10) of the OWRA).</p> <p>See Chapter 2.4 of this Guideline and “Settlement Agreements: A Guide to Submitting Beyond Compliance Projects and Requesting Abatement Measures” for a more detailed discussion on the settlement agreement process.</p>	<p><b>Within 11 months of Ministry becoming aware of the incident</b></p>
<p><b>STEP 4: Issuing an Environmental Penalty Order (s. 182.1(3) of the EPA and s. 106.1(3) of the OWRA)</b></p> <p>The Director issues an EP order. For each violation specified in the EP order, a penalty is assessed in accordance with the EP Regulation, and the penalty must consider:</p> <ul style="list-style-type: none"> <li>• the results of Step 2, the environmental penalty review, if any;</li> <li>• the results of Step 3, the settlement agreement, if any.</li> </ul>	<p><b>Between 16 days to 1 year after the Ministry becomes aware of the incident (1 year statutory limit)</b></p>

<p><b>STEP 5: Appeal Process</b></p> <p>A regulated person who has been issued an EP order has the right to appeal it to the Environmental Review Tribunal (“ERT”) within 15 days of being given the EP order (s. 140 of the EPA and s. 100 of the OWRA), unless the regulated person has agreed not to appeal as part of a settlement agreement (see Step 3). When an appeal is being made to the ERT, the EP order is stayed, pending a decision (s. 143 of the EPA and s. 102 of the OWRA). If the ERT upholds the appeal, the remaining steps do not apply.</p>	<p><b>Within 15 days of the final EP order being issued</b></p>
<p><b>STEP 6: EP Payment (s. 182.1(13) of the EPA and s. 106.1(13) of the OWRA)</b></p> <p>The final EP order states the deadline for payment of the penalty amount. If payment is past due, the ministry may take steps to enforce payment of the penalty amount that include filing the order in Superior Court or refusing or suspending approvals, until payment is made.</p>	<p><b>Within 60 days of the final EP order being issued (unless appealed)</b></p>
<p><b>STEP 7: Confirmation of Compliance</b></p> <p>Compliance with environmental regulations and the terms of any settlement agreement will be assessed by the ministry. In the case of non-compliance, the ministry will again determine the appropriate abatement/enforcement response, consistent with its Compliance Policy. One limitation is that non-compliance with a settlement agreement is not subject to prosecution (i.e. non-compliance with a settlement agreement is not an offence under the EPA or OWRA), but is subject to an EP order (see Table 2 of the regulation or Appendix 2 of the Guideline).</p>	<p><b>Ongoing</b></p>
<p><b>STEP 8: Funds Collected through Payment of Environmental Penalty orders (s. 182.2 of the EPA and s. 19 of the EP Regulation)</b></p> <p>The funds collected from EP orders will be kept in a special purpose account and made available to communities to support environmental remediation and restoration projects and other related activities that address damage caused by spills and pollution.</p>	<p><b>Ongoing</b></p>

## Part 2: Calculating the Penalty Amount

*Part 2 shows how the EP order penalty amount for a violation (or violations) is assessed and calculated.*

### 2.1 Summary – Calculating the Environmental Penalty Amount (s.7)

The formula for calculating the amount of an EP order is set out in s. 7 of the EP Regulation. In general terms, an EP order is comprised of a modified multi-day gravity component and, where applicable, a monetary benefit component (see diagram below).

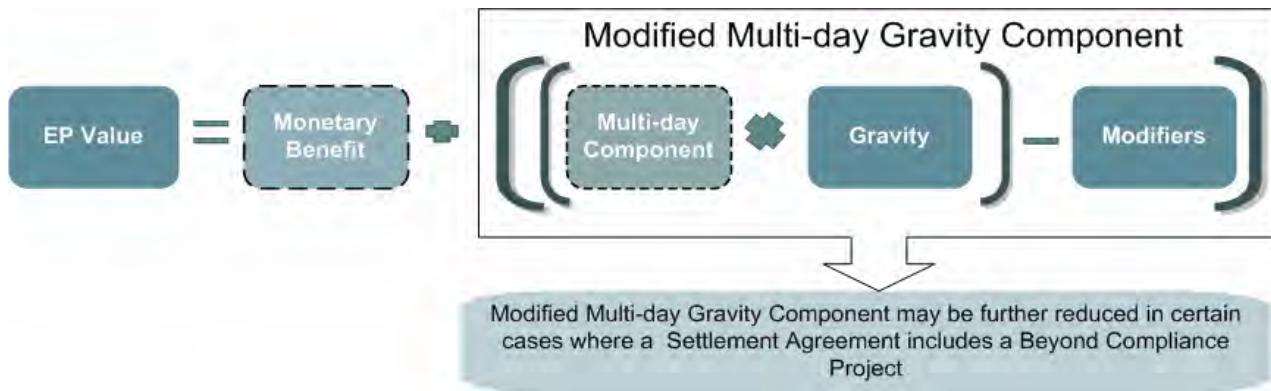
The “gravity component” of the penalty is assessed based on the type and seriousness of the violation. For violations that continue for more than one day (such as a failure to install equipment) the regulation requires that the gravity component be multiplied by a “multi-day component” depending on the length of the violation. The modifiers reduce the gravity component of the penalty, in accordance with the EP Regulation, by considering the preventive and mitigative measures taken or planned to be taken by the regulated person and whether the regulated person had an environmental management system in place that met regulatory requirements.

A cap of a maximum total daily penalty not to exceed \$100,000 per violation is set out in s. 182.1(5) of the EPA and s. 106.1(5) of the OWRA. In addition, the EP Regulation sets out the following caps:

- Failure to report violations are capped at \$100,000. (s. 9(3))
- Phase II violations are capped at the lesser of the amount calculated after 180 days or \$60,000. (s. 9(4))

Phase I violations will come into effect on August 1, 2007 and Phase II violations will come into effect on December 1, 2008. Refer to Table 2 to the EP Regulation or Appendix 2 of this Guideline.

In addition, a reduction to the modified multi-day gravity component may be allowed through completion of a settlement agreement as noted in the diagram below. The “monetary benefit” component of the penalty includes financial benefits gained by the regulated person because of its non-compliance with legal requirements (delayed and avoided costs) and cannot be reduced by entering into a settlement agreement.



### 2.1.1 Penal Consequence

Section 7(2) of the EP Regulations state:

If, after determining the environmental penalty for the contravention, the Director determines that the amount of the environmental penalty is, by its magnitude, punitive in nature having regard to all the circumstances, the Director shall reduce the amount of the environmental penalty to an amount that is consistent with promoting internal discipline among the regulated persons to comply with the requirements under the act.

This provision of the EP Regulation simply makes operational the legal authority to impose an environmental penalty for a violation: because of section 11 of the *Charter*, an EP for a particular violation cannot be of such a magnitude that it represents what the *Charter* jurisprudence refers to as a “true penal consequence”. The penalty assessment scheme prescribed by the EP Regulations has been carefully calibrated to ensure that the amounts determined for violations covered by the EP Regulations are not, by their magnitude, punitive in nature.

In order to determine whether the amount of an EP is, by its magnitude, punitive in nature, the Director should have regard to the amount of fine that the regulated person would be liable to pay, if the person were convicted of an offence for committing the same contravention. It is generally expected that the amount of an EP payable for a contravention will be lower than the amount of a fine the person would be liable to pay on conviction for the same contravention.

Both the EPA and OWRA have a two-tier fine structure for both individuals and corporations, meaning the amount of fine a person is liable to pay if convicted depends on whether the statute defines it as a serious offence or a less serious offence. As regulated persons specified under the EP Regulations are corporations, it is the corporate fines that are relevant in this analysis.

For less serious offences (these include the Phase 2 contraventions in the EP Regulations for which an EP order can be issued starting December 1, 2008), the corporate fines are as follows for each day or part of a day that the offence continues:

1. not more than \$250,000;
2. not more than \$500,000 on each subsequent conviction

For the more serious offences (which include the Phase 1 contraventions in the EP Regulations for which an EP order can be issued starting August 1, 2007), the EPA and OWRA set out both maximum and minimum corporate fines and they are as follows for each day or part of a day on which the offence occurs or continues:

1. not less than \$25,000 and not more than \$6,000,000 on a first conviction;
2. not less than \$50,000 and not more than \$10,000,000 on a second conviction; and
3. not less than \$100,000 and not more than \$10,000,000 on each subsequent conviction.

After the Director determines the penalty for a particular violation in accordance with the rules set out in the EP Regulations, and after the regulated person has applied for and obtained all the reductions the person is eligible for under the EP Regulations (including for any settlement agreement the person has entered into), the Director may then be requested to consider whether, in the circumstances, the amount of the penalty is punitive in nature. The Director should consider reducing a penalty under subsection 7(2), if the Director has reasonable grounds to believe that the penalty is significantly greater from the amount of a fine that the regulated person would be liable for, had the person been convicted of an offence for the same contravention. Generally, the economic benefit portion of the penalty would not be reduced under subsection 7(2) – as the economic benefit portion is by its nature not punitive in nature, but rather the means to remove economic incentives to break the law.

In making a determination on whether a penalty is punitive in nature in accordance with subsection 7(2), the Director may also consider the financial impact of other administrative remedies available to ministry officials under the EPA and OWRA to deal with the contravention that is the subject of the environmental penalty. Other administrative remedies which are available to deal with environmental incidents that involve violations include:

- temporarily suspending the regulated person's approval issued under the EPA,
- for serious environmental incidents where a discharge constitutes an imminent danger, issuing a stop order under section 8 of the EPA
- prohibiting or regulating the discharge of sewage by order under section 31 of the OWRA
- for a violation of section 14, a control order under section 7 of the EPA
- a violation-based order to correct the violation or prevent its recurrence under the EPA or OWRA
- a preventive measure order the EPA or OWRA
- a order or direction under the OWRA to operate sewage works in accordance with the requirements specified in the order or direction
- imposing new conditions in an approval under the EPA

The exercise of these abatement powers to resolve an environmental incident has the potential to impose a significant financial obligation on a regulated person.

Where the amount of the EP is significantly greater than (a) the amount of fine the regulated person would be liable for, if the person were prosecuted and convicted of an offence for the same contravention; or (b) the financial impact on the regulated person of imposing other appropriate administrative remedies (e.g. the amount of the EP is significantly greater than the cost to the regulated person of suspending the regulated person's approval for a period of time), then the Director shall reduce the EP, unless the amount is otherwise consistent with promoting internal discipline among regulated persons to comply with the requirements under the EPA and/or the OWRA. The amount of a reduction, if one is required under subsection 7(2), will depend on the circumstances of each case.

Where the Director is requested to consider the application of subsection 7(2) of the EP Regulations, the Director should always provide reasons in the EP order on how the Director arrived at his or her determination.

## **2.2 The Modified Gravity Component of the Penalty Calculation (ss. 7, 9, 10-15, 16 and 17)**

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The steps for determining the amount of a gravity component of an EP order for a violation are set out in s. 9 of the EP Regulation. The steps for modifying this gravity amount are set out in ss. 7, 16, and 17 of the EP Regulation. The process for calculating the modified multi-day gravity component is discussed in this chapter and can be summarized as follows:

**(1) Range of Gravity Component:** First, the cell of the gravity matrix (see Table 4 of the EP Regulation and the table in Chapter 2.2.3 to this Guideline) that applies to the violation has to be determined. Determining which cell applies to a violation requires determining whether the violation is a Type 1, 2 or 3 violation, and whether the consequences of the violation are less serious, serious, or very serious.

**(2) Gravity Component:** Second, based on factors that the EP Regulation sets out in paragraphs 3, 4 and 5 of s. 9(1) and Appendix 3 to this Guideline, the Director would determine what amount within a cell should be assigned for the violation.

**(3) Multi-day Gravity Component:** Where a violation continues for more than one day, ss. 9 (2) (3) and (4) of the EP Regulation set out rules for how the gravity component of the penalty is determined for each day the violation continues.

**(4) Modified Multi-day Gravity Component:** The Director must then consider whether the person is entitled to any reductions to the multi-day gravity component of the penalty for any preventative/mitigative steps planned or taken (s. 16 and Appendix 4 to this Guideline), or for having an audited EMS in place (s. 17). Once the reductions have been deducted, the amount represents the “modified multi-day gravity component” of the penalty for the violation.

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### **2.2.1 Type of Violation (s. 4)**

Section 4 of the EP Regulation governs the types of violations for which an EP order may be issued. Section 4 refers to Column 2 of Table 2 which lists the legislative and regulatory provisions for which EP orders may be issued (see also Appendix 2 to this Guideline). The list includes violations of requirements set out in orders and approvals.

Column 5 of Table 2 to the EP Regulation sets out whether violations are characterized as Type 1, Type 2, or Type 3. In addition, Table 3 (Regulations Relating to Specific Industrial Sectors) to the EP regulation details the violations subject to EP orders under the MISA regulations. A general summary of the Phases and the Types of violations is described in the following table.

## Phase I Violations: EPs in effect August 1, 2007

Type of Violation	Grouping of Violations-EPA and OWRA EP Regulations	General Description of Violations-EPA and OWRA EP Regulations	Item #s for Table 2 – EPA EP Regulation <sup>1</sup>	Item #s for Table 2 – OWRA EP Regulation <sup>1</sup>
Type 3	Pollution prohibitions	Discharge of contaminant to land or water that causes or may cause an adverse effect [EPA s. 14]	1.	
		Discharge of any material that may impair the quality of the water [OWRA s. 30(1)]		1.
	Failure to mitigate and restore following a spill	Failure to mitigate and restore (land or water) [EPA s. 93]	2.	
Type 2	Failure to report a spill to the ministry	Failure to report a spill to the ministry (e.g. Spills Action Centre (SAC) (land or water) [EPA s. 92]	5.	
		Failure to report a discharge that may impair the quality of the water to the ministry (e.g. SAC) [OWRA s. 30(2)]		4.
	Failing acute lethality test (MISA regulations, approval)	Failing an acute toxicity lethality test in MISA regulations	8.	
		Failing to conduct an acute lethality test as required in an ECA pertaining to sewage works	12.1.	
	Failure to comply with a settlement agreement	Failure to comply with a Settlement Agreement	13.	
		Failure to comply with a Settlement Agreement		12.
Type 1	Exceedance of a discharge limit (MISA regulations, approval, order, notice, direction, or report)	Exceedance of a discharge limit in MISA regulations (and no order is in place regarding those limits)	3.	
		Exceedance of a discharge limit in an order (land or water)	4.	
		Exceedance of a discharge limit in an order, notice, direction, requirement, or report		2.
		Exceedance of limit in an ECA pertaining to sewage works	4.1.	
	Failure to report to director on MISA regulation requirements	Failure to report to director on MISA regulation requirements (e.g. discharge limit exceedances, changes in process or effluent)	7.	
	Failure to report a discharge limit exceedance as required in an order, direction, or approval	Failure to report a discharge limit exceedance where an order requires such reporting	10.	
		Failure to report a discharge limit exceedance where an order or direction requires such reporting		6.
		Failure to report a discharge limit exceedance specified in an ECA where the approval requires such reporting	12.3	

<sup>1</sup> See items listed in Table 2 (Contraventions) to EP Regulations (EPA and OWRA) or Appendix 2a and 2b of this guideline for details on violations.

## Phase II Violations: EPs in effect December 1, 2008

Type of Violation	Grouping of Violations	General Description of Violations-EPA and OWRA EP Regulations	Item #s for Table 2 – EPA EP Regulation	Item #s for Table 2 – OWRA EP Regulation <sup>1</sup>
Type 2	Failure to develop and implement spill prevention and spill contingency plans.	Failure to develop and implement Spill Prevention and Spill Contingency Plans [EPA s. 91.1]	9.	
	Failure to comply with a provision of an order or direction that addresses the adverse effects of a discharge (including constructing works or installing equipment)	Failure to comply with a provision of an order that relates to preventing, eliminating or ameliorating an adverse effect; or the construction, installation or modification of any thing [EPA ss. 7, 8, 17, 18, 97, 157, 157.1]	11.	
		Failure to comply with a provision of an order or direction to prevent, reduce or alleviate any impairment of the quality of water; or the construction, installation or modification of any thing [OWRA ss. 16, 16.1, 16.2, 31, 32, 61, 91, 92]		7.
	Failure to amend or obtain a sewage works approval	Failure to amend or obtain an ECA in relation to a sewage works [OWRA s. 53(1)]		5.
Type 1	Failure to meet other MISA Regulations requirements (e.g. monitoring)	Failure to meet other MISA regulation requirements e.g. monitoring (other than discharge limit exceedances, reports to director, and failing acute lethality tests-items 3, 7, or 8 in Table 2)	6.	
	Failure to comply with an order <b>not</b> related to limit exceedances, reporting; or preventing/improving adverse effects (including constructing works or installing equipment)	Failure to comply with a provision of an order that does <b>not</b> relate to a discharge limit, a requirement to report an exceedance of a discharge limit, or preventing, eliminating or ameliorating an adverse effect; or the construction, installation or modification of any thing	12.	
	Failure to comply with a sewage works approval requirement	Failure to comply with a provision of an order that does <b>not</b> relate to a discharge limit, a requirement to report an exceedance of a discharge limit, or preventing, eliminating or alleviating any impairment of the quality of water; or the construction, installation, or modification of any thing		8.

<sup>1</sup>See items listed in Table 2 (Contraventions) to EP Regulations (EPA and OWRA) or Appendix 2a and 2b of this Guideline for details on violations.

## **2.2.2 Seriousness of the Violation (ss. 10-15)**

The next step in determining which cell of the gravity matrix the violation falls into is to classify whether the consequences of the violation are “less serious”, “serious” or “very serious”. These categories are based on the potential for a violation to harm the environment, human health, or to interfere with the ministry’s capacity to protect and conserve the natural environment.

The regulation sets out different definitions of the three categories of seriousness depending on the kind of requirement violated. For instance, s. 10 of the EP Regulation sets out definitions for the three categories of seriousness where the requirement violated is the general pollution prohibition (s.14 of the EPA and s. 30(1) of the OWRA), while s.11 of the EP Regulation sets out another set of definitions where the requirement violated is the failure to restore the natural environment following a spill (s. 93 of the EPA). The seriousness of violations not identified in s. 10-14 of the EP Regulation are classified using the definition in s. 15. For the OWRA EP Regulation, the seriousness of violations not identified in ss. 10-13 are classified using the definition in s. 14. The Director must determine which type of consequence applies depending on the requirement that has been violated. A general summary of the seriousness of violations is described in the following table.

Violations	Less Serious	Serious	Very Serious	Regulation Table 2 Item Number	
				EPA	OWRA
<b>s. 14 EPA (Adverse effect) or s. 30(1) OWRA (Impair quality of water)</b>	The discharge is a contravention of s. 14 of the EPA or s. 30(1) of the OWRA, and is not classified as "serious" or "very serious".	<p>The contravention causes or may cause one or more of the following adverse effects:</p> <ol style="list-style-type: none"> <li>1. Localized injury or damage to any animal life.</li> <li>2. Widespread or long-term interference with the normal conduct of business.</li> <li>3. Widespread or long-term loss of enjoyment of the normal use of property.</li> <li>4. Widespread damage to property, other than plant or animal life.</li> <li>5. Damage to property, other than plant or animal life, such that the property cannot be restored, within a reasonable time, to the condition that existed immediately before the discharge occurred.</li> </ol>	<p>The contravention causes or may cause one or more of the following effects:</p> <ol style="list-style-type: none"> <li>1. Widespread injury or damage to plant or animal life.</li> <li>2. Harm or material discomfort to any person.</li> <li>3. An adverse effect on the health of any person.</li> <li>4. The impairment of the safety of any person.</li> </ol>	1	1
<b>Discharge Limit Exceedances</b>	Exceedance is less than 50% of the legal limit or pH deviates from limit by less than 0.5 pH units.	Exceedance is equal to or greater than 50% of the legal limit and less than 100%, or pH deviates from limit by 0.5 or less than 1 pH units.	Exceedance is equal to or greater than 100% of the legal limit or pH deviates from limit by 1 or more pH units.	3 & 4	2 & 3
<b>Acute Lethality Limit Failure</b>	Sample fails a legally required acute lethality test (i.e., <i>Daphnia magna</i> or Rainbow trout).	N/A	N/A	8	9
<b>Non-compliance with legal requirements</b> (except spills (s. 14 EPA, s. 30(1) OWRA) and limit exceedances)	Contravention does not result in an adverse effect or interfere with the ministry's capacity to protect and conserve the natural environment or have a potential to do either.	Contravention interferes with the ministry's capacity to protect and conserve the natural environment, or has the potential to do so, but does not result in an adverse effect and does not have the potential to do so.	Contravention results in an adverse effect or has the potential to do so.	5-7 & 9-13	4-8 & 10-12

Violations	Less Serious	Serious	Very Serious	Regulation Table 2 Item Number	
				EPA	OWRA
<b>Failure to comply with beyond compliance measures in a settlement agreement</b>	Regulated person took steps to implement all of the provisions of the agreement, but not within the time specified in the agreement.	The regulated person took steps to implement the provisions of the agreement, and those steps had some effect in preventing, eliminating or reducing the discharge of a material into the natural environment.	The regulated person failed to take any steps to implement the provisions of the agreement that would have had some effect in preventing, eliminating or reducing the discharge of a material into the natural environment.	13	12
<b>Failure to restore the natural environment (s. 93 EPA)</b>	The regulated person did everything practicable to prevent, eliminate and ameliorate the adverse effects resulting from the spill and to restore the natural environment, but did not do so forthwith.	The regulated person took steps that had some effect in preventing, eliminating and ameliorating the adverse effects resulting from the spill or in restoring the natural environment.	The regulated person failed to take any effective steps to prevent, eliminate and ameliorate the adverse effects resulting from the spill or to restore the natural environment.	2	N/A

### **2.2.3 Range of the Gravity Component (s. 9(1)2)**

When the Director has classified the type of the contravention in accordance with Column 5 of Table 2 to the EP Regulation and the “seriousness” of the contravention in accordance with ss. 10-15 of the EP Regulation, the Director then determines the appropriate cell in the gravity matrix for the violation. This cell sets out the range of the gravity component for the violation.

Type of Consequence	Type of Violation		
	Type 1	Type 2	Type 3
Less Serious	\$1,000-\$2,500	\$10,000-\$15,000	\$15,000-\$25,000
Serious	\$2,500-\$5,000	\$20,000-\$30,000	\$30,000-\$50,000
Very serious	\$5,000,-\$10,000	\$40,000-\$60,000	\$60,000-\$100,000

For example, referring to the above table, the gravity component for a violation classified as a “Type 2” and “Serious” violation would fall in the \$20,000-\$30,000 range. Similarly, a “Type 1” and “Very Serious” violation would fall in the \$5,000-\$10,000 range. See Table 4 (Gravity Component) to the regulation.

### **2.2.4 Amount of Gravity Component (s. 9(1)3)**

Once the range of the gravity component has been determined for a violation (i.e. the appropriate cell of the matrix for the violation), the EP Regulation sets out a number of factors that the Director is to consider when determining the specific amount that he or she should set as the gravity component for the violation.

Paragraph 3 of s. 9(1) sets out the factors the Director may consider when setting the amount of the gravity component for the violation. They include:

- the regulated person’s history of convictions and violations subject to EP orders under the EPA and OWRA;
- membership in Ontario’s Environmental Leaders program;
- extent of any delay in complying with the environmental requirement that was violated;
- the extent of the deviation from the requirement.

See Appendix 3 to this Guideline (Penalty Factor Tables) for how these factors are applied.

#### **2.2.4.1 Effect of Toxicity on the Amount of the Gravity Component (ss. 9(1)4 and 5)**

Section 2 of the EP Regulation defines a toxic substance to be a substance listed in Table 1 of the ministry's "Environmental Penalties – Code of Toxic Substances" document (May 2007 as amended from time to time). The presence of a toxic substance in certain violations will result in an increase to the gravity component. These violations are set out in paragraphs 4 and 5 of s. 9(1) and, in general terms include a discharge that contains a toxic substance, an exceedance of a limit parameter that is a toxic substance and the failure to restore (s. 93 of the EPA) where the spill contained a toxic substance. The gravity component for these types of violations is multiplied by a factor of 1.35.

The penalty factor tables in Appendix 3 to this Guideline have incorporated the toxicity factor into the gravity penalty value for limit exceedances, s. 14 of the EPA and s. 30 of the OWRA violations and failure to restore violations.

#### **2.2.5 Amount of Gravity Component for Multi-Day Violations (ss. 9(2), (3) and (4))**

There are three methods of calculating the amount of the "multi-day gravity component" for violations that continue for more than one day ("multi-day violations"). The general rule is set out in s. 9(2) of the EP Regulation and specifies that the gravity component is to be multiplied by the number of days on which the contravention continues.

However, for failure to report violations (items 5, 7 and 10 of Table 2 to the EP Regulation), the gravity component of the multi-day penalty cannot exceed \$100,000. (See s. 9(3) of the EP Regulation)

The third rule is set out in s. 9(4) and pertains to Phase II violations (items 6, 9, 11, and 12 of Table 2 to the EP Regulation). This rule requires that a percentage amount of the gravity component is determined and summed for each day the violation continues, based on the sliding scale below. In addition, for all Phase II violations, the gravity component of the multi-day penalty cannot exceed the lesser of \$60,000 or the value of the penalty calculated up to 180 days.

Day 1	Days 2-7	Days 8-30	Days 31-90	Days 91-180	Days 181+
100%	(50%)	(25%)	(10%)	(5%)	(0%)

### **Example: Phase II Violation**

The total penalty amount for a multi-day violation with a gravity component amount of **\$1,000** which occurs over **10** days is as follows:

Day	Percentage of Gravity Component	Amount
1	100	1,000
2	50	500
3	50	500
4	50	500
5	50	500
6	50	500
7	50	500
8	25	250
9	25	250
10	25	250
<b>Total Penalty Amount</b>		<b>\$4,750</b>

In the case of violations where the party fails to conduct a grab sample for daily, weekly, monthly or quarterly monitoring, each failure to perform that action is considered a single, one day violation for the purposes of calculating the gravity component of the penalty (e.g., failure to perform one weekly sample is a 1 day violation, not a 7 day violation). However, for other violations, such as failure to submit a report, each day that the violation continues may be considered as part of a multi-day violation. Note that the number of days of non-compliance for the purposes of calculating the monetary benefit component of recurring violations is different. See Chapter 2.4 of the “Procedure for the Calculation of the Monetary Benefit Component” (May 2007 as amended from time to time) for details.

### **2.2.6 Adjustment of Multi-day Gravity Component Amount (Modifiers) (ss. 16 & 17)**

Under the s. 6 request for review, the regulated person may provide information relevant to the violation that may reduce the amount of the gravity component including:

- actions taken by the regulated person to prevent the violation; or
- actions taken by the regulated person to mitigate the effects of the violation; or
- an audited EMS in place at the time of the violation that meets regulatory requirements.

For item 1, 3, and 4 violations of Table 2 to the EP Regulation, a regulated person is entitled up to a 20% reduction of the multi-day gravity component if they undertook the specified preventative steps and up to a 10% reduction if they undertook the specified mitigative steps outlined in the EP Regulation (ss.16(1) and (2)). For an item 2 violation of Table 2 to the EP Regulation, a regulated person is entitled up to a 30% reduction of the multi-day gravity component if they undertook the specified preventative and

mitigative steps outlined in the EP Regulation (s.16(3)). For all other violations listed in Table 2, a regulated person is entitled to a reduction of up to 30% for the preventative and mitigative steps taken (s.16(4)).

As set out in s. 17 of the EP Regulation, an additional 5% reduction will be made to the multi-day gravity penalty amount if the regulated person can demonstrate that they had an audited EMS in place at the time of the violation that meets regulatory requirements. Section 17 of the EP Regulation specifies that the EMS must either be certified/registered ISO14001, determined to be compliant with ISO14001, or verified as meeting requirements of Responsible Care. To obtain the 5% reduction, the regulated person must provide documentation that the EMS was audited in accordance with s. 17 within three years prior to the violation.

See Appendix 4 of this document for detailed information on how modifiers will be applied to reduce the amount of the gravity component for a violation.

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## 2.3 Monetary Benefit Component of the Penalty Calculation (s. 8)

When a regulated person fails to comply with a requirement under the EPA or OWRA, whether the violation was deliberate or accidental, the regulated person may acquire a monetary benefit from the non-compliance. Section 8 of the EP Regulation defines two sources of monetary benefits that a Director will consider when issuing an EP order: (1) **Avoided Costs** and (2) **Delayed Costs**. Where the Director determines that the regulated person has acquired a monetary benefit from the contravention, s. 8 then requires the Director to determine the timeframe during which the regulated person acquired the monetary benefit and then to determine the amount of the monetary benefit in accordance with this procedure.

### Avoided Costs

The EP Regulation defines “avoided costs” to mean: “costs that the regulated person avoided incurring by failing to comply with a provision described in Table 2 of the EP Regulation”. Appendix 2 to this Guideline includes the list of provisions described in Table 2 of the EP Regulation.

Avoided costs apply in respect of provisions that must be complied with on or by a certain date and that, once that date has passed, cannot be complied with on a future date.

Avoided costs would include, among others: costs associated with human resources, energy, consumable materials, disposal of residuals, and laboratory analyses. For example, if a regulated person does not undertake daily sampling and analysis of a regulated substance over a period of a month, it can never incur the costs for that month's sampling and analysis, even when daily sampling and analysis is resumed.

## **Delayed Costs**

The EP Regulation defines “delayed costs” to mean: “costs that the regulated person delayed incurring by delaying compliance with a provision described in Table 2”.

Appendix 2 to this Guideline includes the list of provisions described in Table 2 of the EP Regulation.

Delayed costs would include, among others: depreciable capital investments, such as pollution control equipment (e.g. wastewater treatment systems, storm water management systems) and secondary (spill) containment systems; and non-depreciable things, such as spill prevention plan development, spill contingency plan development and environmental compliance approvals – related studies, preparation of application and application fee.

In each case where an EP order is used to respond to a violation, the Director will consider whether the regulated person has acquired a monetary benefit from the non-compliance for **avoided or delayed costs**. However, a monetary benefit component will only be added to the EP order by the Director when **avoided or delayed costs** can be identified and clearly linked to legal requirements under the EPA and OWRA, including orders, approvals or regulations under those acts, and the total amount of the monetary benefit acquired by the regulated person is over \$300.

Examples of violations that are likely to result in delayed or avoided costs that would lead to the calculation of monetary benefits include, but are not limited to:

- failure to obtain an Environmental Compliance Approval;
- failure to install, operate, or maintain pollution prevention or mitigation equipment as a requirement by an Environmental Compliance Approval or provincial officer order;
- failure to sample, analyze and report as required by regulations, an Environmental Compliance Approval or provincial officer order.

If the Director assesses a monetary benefit component for an EP order, the NOI will indicate an estimated amount of the monetary benefit and a summary of how it was calculated. Under the s. 6 request for review, the regulated person may request that the Director consider any information submitted with the request (e.g. case-specific interest rates, more specific costs of capital, etc.). Unlike the gravity component of an environmental penalty, a regulated person cannot seek and obtain reductions to the monetary benefit component of the penalty. Also, the monetary benefit cannot be reduced by entering into a settlement agreement with the Director.

Refer to the policy guideline, “Procedure for the Calculation of the Monetary Benefit Component of Environmental Penalties” (May 2007) as amended from time-to-time for the formulas to calculate compliance costs which are delayed or avoided.

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## **2.4 Settlement Agreement Component of the Penalty Calculation (s. 18)**

A regulated person may obtain a further reduction to the modified multi-day gravity component of an EP order by proposing to implement a BCP that relates to preventing, eliminating or reducing the discharge of contaminants from the person's plant into the natural environment. A BCP is a project that leads to the implementation of measures beyond those required by any law that may apply to the person's plant.

If a regulated person enters into a settlement agreement with the Director to implement a BCP, the modified multi-day gravity component of the EP order can be reduced by up to 75%. In order to obtain this reduction, the regulated person must invest \$3 in the BCP for every \$1 of penalty reduction. All EP orders are eligible for this 75% reduction.

For Phase II violations, the modified multi-day gravity component can be reduced a further 25%. However, to obtain this further reduction, the regulated person must invest \$5 in the BCP for every \$1 reduction in the penalty. Accordingly, for these Phase II violations, it is possible to achieve a 100% reduction in the modified multi-day gravity component.

No reduction can be made for a settlement agreement that includes only abatement measures or to the monetary benefit component of an EP order.

The Director retains the right to approve or deny any BCP proposal, including proposals that otherwise meet the requirements as outlined in the document "Settlement Agreements – A Guide for Submitting Beyond Compliance Projects and Requesting Abatement Measures" (May 2007) as amended from time-to-time.

# Part 3: Description of Key Process Components

*Part 3 provides more detailed discussion of key components of the EP framework including: NOI; request for review; environmental review period; and use of funds collected through payments of EP orders.*

## 3.1 Notice of Intention (NOI) to Issue a Penalty (s. 5)

Before a Director issues an EP order to a regulated person for a contravention that occurs at its plant or is related to the operations of its plant, s. 5 of the EP Regulation requires the Director to first provide a written NOI to issue an EP order to the regulated person. The NOI is intended to provide the regulated person with the basis on which the Director may issue a penalty order, the regulated person's rights under the legislation, and their ability to provide additional information as part of a request for review. Prior to issuing the NOI, the ministry may discuss its intent to issue an EP order and the circumstances of the violations with the regulated person so as to have the most up to date and current information available when issuing the NOI.

Where the Director is considering the issuance of a NOI where the amount of a penalty is significant for the violation, the Director should consult first with Legal Services Branch before issuing the NOI in order to obtain their input on the NOI. For such cases, the Director should ensure Legal Services Branch advice is sought periodically in the process leading up to the issuance of the EP order. Finally, if the Director believes that a particular penalty calculation for a violation requires the application of subsection 7(2), the Director should also consult with and seek legal advice from Legal Services Branch before making a determination under that provision.

### 3.1.1 Contents of the NOI

The NOI advises the regulated person of the violations to which the proposed EP order relates. Specifically, it identifies the item number on Table 2 of the EP Regulation. The NOI also sets out how the violation has been classified in terms of its type (Type 1, 2, or 3) and seriousness (less serious, serious, or very serious). It then specifies the gravity matrix cell in which each violation listed in the NOI falls into (see Chapter 2.2.3 of this Guideline and Table 4 (Gravity Component) of the EPA EP Regulation and Table 3 (Gravity Component) of the OWRA EP Regulation). For each violation, the NOI then lists the factors that the Director intends to apply when determining the appropriate amount of the EP, within the range set out in the applicable cell (paragraph 3 of s.9(1) of the regulation).

Depending on the violation, s. 5 of the EP Regulation may require that the NOI include:

- a description of the adverse effects that were caused or that may be caused by the violation (e.g. violations of section 14 of the EPA and section 30(1) of the OWRA) and a statement indicating whether the discharge contained a toxic substance; (paragraph 5)
- the number of days on which the violation occurred or continued for which the Director intends to issue an EP order, as applicable; (paragraph 6)
- the location of the violation, if appropriate; (paragraph 7)

- if the Director intends to assess a monetary benefit component for a violation, an estimate of the monetary benefit component, a summary of how it was determined, and the timeframe that was used to estimate the monetary benefit, as applicable. (paragraph 8)

Paragraphs 9 and 10 of s. 5(1) of the EP Regulation require the inclusion of an explanation of the regulated person's right to request a reduction in the EP penalty amount and the grounds on which the reduction may be given. This includes the legislated right to request a reduction for preventive and mitigative measures, and a reduction for having an audited EMS in place at the time of the violation that meets the requirements of s. 17 of the EP Regulation.

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### **3.2 Request for Review of Penalty by a Regulated Person (s. 6)**

Under s. 6 of the EP Regulation, the regulated person may request that the Director consider certain information when calculating an EP order for the violations set out in the NOI. The request must be made in writing within 15 days of the date indicated on the NOI. The NOI should be served via a means that allows for same-day delivery (e.g. personal service, fax service or e-mail service) in order to allow the regulated person the full 15 days to respond. In extenuating circumstances, the deadline for requesting a review may be extended by written agreement of the Director.

Note: the details of any potential settlement agreement proposal do not have to be provided within the 15 day period.

#### **3.2.1 Contents of the Request**

The request may apply to one or more parts of the EP penalty calculation:

<b>Amount of Gravity Component:</b>	The regulated person may provide information for the Director to consider when assessing the gravity component of the EP amount, including the multi-day component of the calculation (para. 3 of s. 6(1)). For instance, the regulated person may believe that the Director has erroneously classified a violation as a Type 2 violation as opposed to a Type 1 violation. Alternatively, the regulated person may believe that the Director has classified the consequence of a violation as "very serious" as opposed to "serious" and provide information to that effect. If the NOI is for a toxic substance, the regulated person may request that the Director consider information demonstrating that the toxic substance or its concentration did not result from the operation or activities of the plant (para. 2 of s. 6(1)).
<b>Preventative and Mitigative Adjustments:</b>	The regulated person may request a reduction based on steps taken to prevent or mitigate the violation. The request must state the grounds for the reduction and specify the steps taken consistent with those listed in Appendix 4 (para. 4 of s. 6(1) and para. 1 of s. 6(3)).
<b>EMS Adjustments:</b>	The regulated person may request a reduction if it can show documentation that at the time of the violation it had an audited Environmental Management System (EMS) in place that meets regulatory requirements (i.e. s. 17, para. 5 of s. 6(1), and para. 2 of

s. 6(3)).

<b>Monetary Benefit:</b>	If the NOI includes an estimate of monetary benefit, the regulated person may request the Director to consider the information that accompanies the request and reassess the monetary benefit (para. 1 of s. 6(1)). Refer to “Procedure for the Calculation of the Monetary Benefit Component of Environmental Penalties” for further details.
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If the NOI applies to more than one violation, the request for review may also apply to more than one violation.

Paragraph 3 of s. 6(3) provides that a regulated person may submit “all information and submissions that the regulated person wants the Director to consider with respect to the request”. As part of this request, the regulated person may submit information to demonstrate that the imposition of the environmental penalty will impose a severe financial hardship on the company. The Director may take this information into account in determining whether to issue the EP order or whether another compliance measure may be more appropriate under the circumstances. The Director may also take this information into consideration in determining the schedule for payment of the penalty that would be set out in the EP order. Generally, where alleviating financial hardship can be accommodated through a payment schedule as opposed to not issuing the EP order, this option should be chosen by the Director. As discussed in Chapter 3.4.1 of this document, the regulated person may request that the ministry undertake a financial impact analysis in accordance with Guideline F-14 “Economic Analyses of Control Documents on Private Sector Enterprises and Municipal Projects”.

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### **3.3 Environmental Penalty Review Period**

During the EP order review period, the Director considers the information he/she has relating to the violation, including any information provided by the regulated person through a request for a review.

The objective is to ensure that the Director has sufficient and accurate information to:

1. determine the gravity component of the penalty amount (including the multi-day component);
2. where applicable, determine whether or not the toxic substance or its concentration resulted from the operation or activities of the plant;
3. adjust the gravity component of the penalty amount based on the steps taken by the regulated person to prevent or mitigate the violation;
4. determine whether the regulated person is eligible for an EMS reduction; and
5. determine the monetary benefit component of the penalty, as applicable.

As per s. 182.1(8) of the EPA and s. 106.1(8) of the OWRA, an EP order must be issued within one year of either the date of the violation, or the date that evidence of the violation first came to the attention of the ministry (through the Director or a Provincial Officer).

### **3.3.1 Environmental Management Systems (s. 17)**

As set out in s. 17 of the EP Regulation, the Director will reduce the gravity portion of the EP order by 5% if the regulated person can demonstrate that an audited EMS was in place at the plant at the time of the violation that meets regulatory requirements. The EMS must have been audited within three years prior to the violation to confirm that the plant's EMS meets one of the following regulatory requirements:

#### **1. ISO Registered**

- Certified/registered as meeting Canadian Standards Association's ("CSA") "Environmental management systems - Requirements with guidance for use" (CAN/CSA-ISO 14001:04 as amended from time to time) by an EMS registrar that has been accredited by:
  - the Standards Council of Canada ("SCC"); or
  - an accreditation body outside of Canada that is a signatory to the International Accreditation Forum Multilateral Recognition Arrangement ("IAFMRA").
- Certification is recorded in a registry maintained by the registrar.

#### **2. ISO Compliant**

- Determined to be compliant with CSA's "Environmental management systems - Requirements with guidance for use" (CAN/CSA-ISO 14001:04 as amended from time to time) by a person who:
  - is not an employee at the plant or a contractor who routinely works at the plant;
  - audits according to a code of practice that conforms with CSA's "Guidelines for quality and/or environmental management systems auditing" (CSA/ISO 19011:2003 as amended from time to time; and
  - certified by an auditing certification body that has been accredited by the SCC (including the Canadian Environmental Certification Approvals Board); or a body outside of Canada that is a signatory to the IAFMRA.

#### **3. Responsible Care**

- Verified as meeting the requirements set out in the Canadian Chemical Producers' Association's ("CCPA") "Ethic and Codes of Practice of Responsible Care Commitment Package – Part 1 and "The Responsible Care Way of Life... expectations of member and partner companies: Commitment Package – Part II" (November, 2000 as amended from time to time) by a person authorized by the CCPA to audit environmental management systems. Though the EP regulation does not expressly refer to both documents – the reference in the regulation to the Responsible Care EMS standard should be understood as capturing both documents – as the cover of both documents indicate that they must be read together.

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## **3.4 Penalty Payment**

The final EP order will state the time period within which to pay the penalty amount, the method of payment and to whom the payment should be sent. Generally, the EP order will provide the regulated person with 60 days to pay the EP order from the date of service of the order or the date of an ERT decision which upholds the EP order, should the EP order be appealed.

### **3.4.1 Ability to Pay**

In order to extend the payment date or to seek instalment payments, the regulated person may request that the ministry undertake a financial impact analysis to confirm its claim of financial hardship as a result of complying with the EP order. This request must be made within 15 days of receiving a final EP order or ERT decision. The ministry may undertake a financial impact analysis, consistent with its Guideline F-14, “Economic Analyses of Control Documents on Private Sector Enterprises and Municipal Projects” (April, 1994) as amended from time-to-time.

Paragraph 3 of s. 6(3) provides that a regulated person may submit “all information and submissions that the regulated person wants the Director to consider with respect to the request”. If the regulated person is claiming financial hardship as a result of complying with the EP order it must provide the documents identified in Chapter 5.2 of Guideline F-14 as part of its initial request to the Director that issued the EP order. The ministry may request additional information from the regulated person, as it considers necessary.

The Director may take this information into account in determining whether to issue the EP order or whether another compliance measure may be more appropriate under the circumstances. The Director may also take this information into consideration in determining the schedule for payment of the penalty that would be set out in the EP order. Generally, where alleviating financial hardship can be accommodated through a payment schedule as opposed to not issuing the EP order, this option should be chosen by the Director.

### **3.4.2 Failure to Pay**

If the EP order is not paid by the deadline, the ministry will send a notice of default to the regulated person that requires payment of the penalty upon receipt of the notice. The notice of default will outline the ministry’s potential responses under s. 182.1(13) of the EPA and s. 106.1(13) of the OWRA if payment is not received within 30 days of the notice:

- file the EP order or ERT decision with the Superior Court of Justice such that the order or decision may be enforced as if it were an order of the court;
- suspend any approvals, licenses or permits held by the regulated person until the penalty is paid;
- refuse to issue any approvals, licenses or permits to the regulated person until the penalty is paid

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### **3.5 Use of Funds Collected through Environmental Penalty Orders (s. 19)**

In accordance with s.182.2 of the EPA and s. 106.2 of the OWRA, EP order payments will be held in a Special Purpose Account (“SPA”) administered centrally by the ministry. The distribution of funds will also be managed centrally.

The basic framework for the administration of the SPA and the distribution of funds is described below.

#### **3.5.1 Eligible Projects**

First priority for funding will be given to environmental remediation and restoration projects. Other projects that may be eligible for SPA funds are set out in s.19 of the EP Regulation and include research, education, and outreach activities for:

- spill prevention and response (e.g., enhancing spill notification techniques);
- pollution prevention (e.g., investigating methods for improving pollutant containment; promoting pollution prevention practices);
- impacts of contaminant discharge into the natural environment (e.g., investigating the long-term effects and cumulative impacts of pollutant discharges on natural environments and public health; conducting an environmental damage assessment; developing environmental damage assessment methods);
- remediation and restoration of the natural environment (e.g., developing environmental damage restoration techniques).

Funds may also be used to provide financial assistance for measures to build community capacity for spill preparedness and response.

The ministry will not direct payments from the SPA to compensate persons for “loss or damage (including loss of life, loss of use or enjoyment of property and pecuniary loss, including loss of income) that result from spills. Part X of the EPA provides a person that has suffered loss or damage as a result of a spill with the ability to seek recovery from the party or parties responsible for the spill.

#### **3.5.2 SPA Framework**

An annual application cycle will allow eligible organizations within affected communities to request funding from the SPA for projects that meet the criteria (see below for the definition of “eligible organizations” and “affected communities”). The amount of funding available to communities will be advertised each year based on the amount of EP order payments received within each community in the previous year.

#### **3.5.3 Eligible Organizations**

Eligible organizations that may apply for funding include:

- non-profit organizations such as community-based environmental groups;

- Aboriginal communities and organizations;
- academic institutions;
- municipalities;
- conservation authorities.

Only eligible organizations undertaking work within the communities in which EP orders are issued (referred to as 'affected communities') may apply. The boundaries of affected communities will in most cases be defined by environmentally-relevant criteria (e.g. watershed), not necessarily by municipal boundaries. In certain circumstances, including, for example, affected communities expressing no interest in the available funds, SPA funds may be allocated to projects in other communities.

#### **3.5.4 Application Process**

- The ministry will promote the SPA through its website, as well as other mechanisms, such as brochures and fact sheets, media alerts and advertisements. Detailed information on the application process and eligibility will be available on the ministry's website before announcements are made.

## **Appendices**

## Appendix 1: Phased Implementation of Environmental Penalty Orders

<b>Phase I Violations (EPs in effect August 1, 2007)</b>
<ul style="list-style-type: none"><li>• s. 14 of the EPA (Pollution Prohibition)</li><li>• s. 30(1) of the OWRA (Pollution Prohibition)</li><li>• s. 93 of the EPA (Duty to Restore the Natural Environment)</li><li>• Discharge limit exceedances in MISA regulations, order, notice, direction, or report</li><li>• Acute lethality test failures in the MISA regulations and Environmental Compliance Approvals pertaining to sewage works (EPA 20.3)</li><li>• s. 92 of the EPA (Notification of Spills)</li><li>• s. 30(2) of the OWRA (Notification of Pollutant Discharge)</li><li>• Reporting of exceedances of discharge limits in the MISA regulations</li><li>• Reporting of exceedances of discharge limits in an order, approval, notice, direction, requirement, or report</li><li>• s. 182.1(9) of the EPA (Agreements) and s. 106.1(9) of the OWRA (Agreements)</li></ul>
<b>Phase II Violations (EPs in effect December 1, 2008)</b>
<ul style="list-style-type: none"><li>• s. 53(1) of the OWRA (requirement to obtain ECA for Sewage Works)</li><li>• Non-compliance with an ECA pertaining to sewage works</li><li>• All remaining provisions of the MISA regulations:<ul style="list-style-type: none"><li>• O. Reg. 215/95 (Electric Power Generation)</li><li>• O. Reg. 561/94 (Industrial Minerals)</li><li>• O. Reg. 64/95 (Inorganic Chemical)</li><li>• O. Reg. 214/95 (Iron and Steel Manufacturing)</li><li>• O. Reg. 562/94 (Metal Casting)</li><li>• O. Reg. 560/94 (Metal Mining)</li><li>• O. Reg. 63/95 (Organic Chemical Manufacturing)</li><li>• O. Reg. 537/93 (Petroleum)</li><li>• O. Reg. 760/93 (Pulp and Paper)</li></ul></li><li>• s. 7 of the EPA (Control orders)</li><li>• s. 8 of the EPA (Stop orders)</li><li>• s. 17 of the EPA (Remedial orders)</li><li>• s. 18 of the EPA (Director's orders - Preventive Measures)</li><li>• s. 91.1 of the EPA (Spill Prevention and Spill Contingency Plans)</li><li>• s. 97 of the EPA (Orders by Minister, Spills)</li><li>• s. 157 of the EPA (Provincial Officer orders)</li><li>• s. 157.1 of the EPA (Provincial Officer orders – Preventive Measures)</li><li>• s. 16 of the OWRA (Provincial Officer orders – Violations)</li><li>• s. 16.1 of the OWRA (Provincial Officer orders – Preventive Measures)</li><li>• s. 16.2 of the OWRA (Provincial Officer orders – Sewage/Water Works)</li><li>• s. 31 of the OWRA (Prohibiting/Regulating Sewage Discharge)</li><li>• s. 32 of the OWRA (Director's order – Alleviate Effects of Impairment to Water Quality)</li><li>• s. 61 of the OWRA (Sewage Works to be Kept in Repair)</li><li>• s. 91 of the OWRA (Director's order – Sewage Disposal)</li><li>• s. 92 of the OWRA (Director's order – Discharge of Sewage into Sewage Works)</li></ul>

## Appendix 2a: Contraventions (EPA EP Regulation-Table 2)

Item	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
	Provision of the Act	Description of the contravention	Circumstances	First date on which an environmental penalty may be ordered for the contravention	Type of contravention	Section of this Regulation that specifies the type of consequence
1.	Subclause 182.1 (1) (a) (i)	Contravention of section 14 of the Act (prohibits discharge of a contaminant into the natural environment that causes or may cause an adverse effect)	1. The discharge is to land or water. 2. The discharge is of a pollutant as defined under Part X of the act.	August 1, 2007	Type 3	10
2.	Subclause 182.1 (1) (a) (ii)	Contravention of section 93 of the act (duty to mitigate and restore where pollutant is spilled that causes or is likely to cause an adverse effect).	The spill is to land or water.	August 1, 2007	Type 3	11
3.	Subclause 182.1 (1) (a) (iii)	Contravention of a provision of the regulations that establishes or has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment.	1. The contravention is of a provision listed in Column 2 of Table 3, in the regulation named beside the provision in Column 1 of the Table. 2. No order under this Act and no order or direction under the <i>Ontario Water Resources Act</i> has been issued to the regulated person in respect of the contravention referred to in paragraph 1.	August 1, 2007	Type 1	12

Item	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
	Provision of the Act	Description of the contravention	Circumstances	First date on which an environmental penalty may be ordered for the contravention	Type of contravention	Section of this Regulation that specifies the type of consequence
4.	Subclause 182.1 (1) (a) (iv)	Contravention of a provision of an order under the act that establishes or has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment.	The discharge is to land or water.	August 1, 2007	Type 1	12
4.1	Subclause 182.1 (1) (a) (v)	Contravention of a provision of an environmental compliance approval, certificate of property use, renewable energy approval, licence or permit under the act that establishes or has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment.	The contravention is of a provision of an environmental compliance approval issued in respect of an activity mentioned in subsection 53 (1) of the <i>Ontario Water Resources Act</i> .	October 31, 2011	Type 1	12
5.	Subclause 182.1 (1) (b) (i)	Contravention of a provision of the act or the regulations, other than a provision referred to in subclause 182.1 (1) (a) (i), (ii) or (iii) of the act.	1. The spill is to land or water. 2. The contravention is of section 92 of the act.	August 1, 2007	Type 2	15
6.	Subclause 182.1 (1) (b) (i)	Contravention of a provision of the act or the regulations, other than a provision referred to in subclause 182.1 (1) (a) (i), (ii) or (iii) of the act.	The contravention is of a provision of a regulation listed in Column 1 of Table 3, other than a provision specified in Column 2, 3 or 4 of the Table.	December 1, 2008	Type 1	15

Item	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
	Provision of the Act	Description of the contravention	Circumstances	First date on which an environmental penalty may be ordered for the contravention	Type of contravention	Section of this Regulation that specifies the type of consequence
7.	Subclause 182.1 (1) (b) (i)	Contravention of a provision of the act or the regulations, other than a provision referred to in subclause 182.1 (1) (a) (i), (ii) or (iii) of the act.	The contravention is of a provision listed in Column 3 of Table 3, in the regulation named beside the provision in Column 1 of the Table.	August 1, 2007	Type 1	15
8.	Subclause 182.1 (1) (b) (i)	Contravention of a provision of the act or the regulations, other than a provision referred to in subclause 182.1 (1) (a) (i), (ii) or (iii) of the act.	The contravention is of a provision listed in Column 4 of Table 3, in the regulation named beside the provision in Column 1 of the Table.	August 1, 2007	Type 2	13
9.	Subclause 182.1 (1) (b) (i)	Contravention of a provision of the act or the regulations, other than a provision referred to in subclause 182.1 (1) (a) (i), (ii) or (iii) of the act.	The contravention is of section 91.1 of the act.	December 1, 2008	Type 2	15
10.	Subclause 182.1 (1) (b) (ii)	Contravention of a provision of an order under the act, other than an order under section 99.1, 100.1 or 150 of the act, an order of a court or a provision referred to in subclause 182.1 (1) (a) (iv) of the act.	The provision of the order requires the regulated person to report a failure to comply with another provision of the order that has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment.	August 1, 2007	Type 1	15

Item	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
	Provision of the Act	Description of the contravention	Circumstances	First date on which an environmental penalty may be ordered for the contravention	Type of contravention	Section of this Regulation that specifies the type of consequence
11.	Subclause 182.1 (1) (b) (ii)	Contravention of a provision of an order under the act, other than an order under section 99.1, 100.1 or 150 of the act, an order of a court or a provision referred to in subclause 182.1 (1) (a) (iv) of the act.	<ol style="list-style-type: none"> <li>1. The order is issued under section 7, 8, 17, 18, 97, 157 or 157.1 of the act.</li> <li>2. In the case of an order issued under section 7, 8, 17, 18, 97 or 157.1, the circumstances giving rise to the order relate to a discharge or a potential discharge to land or water.</li> <li>3. In the case of an order issued under section 157, the order is issued in response to a contravention specified in this Table.</li> <li>4. The provision of the order that is contravened relates to,           <ol style="list-style-type: none"> <li>i. preventing, eliminating or ameliorating an adverse effect, or</li> <li>ii. the construction, installation or modification of any thing.</li> </ol> </li> </ol>	December 1, 2008	Type 2	15

Item	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
	Provision of the Act	Description of the contravention	Circumstances	First date on which an environmental penalty may be ordered for the contravention	Type of contravention	Section of this Regulation that specifies the type of consequence
12.	Subclause 182.1 (1) (b) (ii)	Contravention of a provision of an order under the act, other than an order under section 99.1, 100.1 or 150 of the act, an order of a court or a provision referred to in subclause 182.1 (1) (a) (iv) of the act.	<ol style="list-style-type: none"> <li>1. The order is issued under section 7, 8, 17, 18, 97, 157 or 157.1 of the act.</li> <li>2. In the case of an order issued under section 7, 8, 17, 18, 97 or 157.1, the circumstances giving rise to the order relate to a discharge or a potential discharge to land or water.</li> <li>3. In the case of an order issued under section 157, the order is issued in response to a contravention specified in this Table.</li> <li>4. The provision of the order that was contravened is not a provision of an order described in item 4, 10 or 11 of this Table.</li> </ol>	December 1, 2008	Type 1	15
12.1	Subclause 182.1 (1) (b) (iii)	Contravention of a provision of an environmental compliance approval, certificate of property use, renewable energy approval, licence or permit under the act.	<ol style="list-style-type: none"> <li>1. The contravention is of a provision of an environmental compliance approval issued in respect of an activity mentioned in subsection 53(1) of the <i>Ontario Water Resources Act</i>.</li> <li>2. The provision of the environmental compliance approval that is contravened requires the regulated person to conduct an acute lethality test on contaminated or potentially contaminated sewage.</li> </ol>	October 31, 2011	Type 2	13

Item	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
	Provision of the Act	Description of the contravention	Circumstances	First date on which an environmental penalty may be ordered for the contravention	Type of contravention	Section of this Regulation that specifies the type of consequence
12.2	Subclause 182.1 (1) (b) (iii)	Contravention of a provision of an environmental compliance approval, certificate of property use, renewable energy approval, licence or permit under the act.	<ol style="list-style-type: none"> <li>1. The contravention is of a provision of an environmental compliance approval issued in respect of an activity mentioned in subsection 53(1) of the <i>Ontario Water Resources Act</i>.</li> <li>2. The provision of the environmental compliance approval that is contravened is not a provision of an approval described in item 4.1, 12.1 or 12.3 of this Table.</li> </ol>	October 31, 2011	Type 1	15
12.3	Subclause 182.1 (1) (b) (iii)	Contravention of a provision of an environmental compliance approval, certificate of property use, renewable energy approval, licence or permit under the act.	The environmental compliance approval issued in respect of an activity mentioned in section 53 of the <i>Ontario Water Resources Act</i> requires the regulated person to report a failure to comply with a provision of the approval that has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment.	October 31, 2011	Type 1	15
13.	Subclause 182.1 (1) (b) (v)	Contravention of a provision of an agreement under subsection 182.1 (9) of the act.	N/A	August 1, 2007	Type 2	14, 15

## Appendix 2b: Contraventions (OWRA EP Regulation-Table 2)

Item	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
	Provision of the Act	Description of the contravention	Circumstances	First date on which an environmental penalty may be ordered for the contravention	Type of contravention	Section of Regulation specifies type of consequence
1.	Subclause 106.1 (1) (a) (i)	Contravention of subsection 30 (1) of the act (creates offence to discharge or cause or permit the discharge of any material of any kind into or in any waters or on any shore or bank thereof or into or in any place that may impair the quality of the water of any waters).	N/A	August 1, 2007	Type 3	10
2.	Subclause 106.1 (1) (a) (iii)	Contravention of a provision of an order, notice, direction, requirement or report under the act that establishes or has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment.	N/A	August 1, 2007	Type 1	11
3	REVOKE: O. Reg. 252/11, s. 8 (1).					
4.	Subclause 106.1 (1) (b) (i)	Contravention of a provision of the act or the regulations other than a provision referred to in clause 106.1 (1) (a) of the act.	The contravention is of subsection 30 (2) of the act.	August 1, 2007	Type 2	14
5.	Subclause 106.1 (1) (b) (i)	Contravention of a provision of the act or the regulations other than a provision referred to in subclause 106.1 (1) (a) (i) or (ii) of the act.	The contravention is of subsection 53(1) of the act.	December 1, 2008	Type 2	14

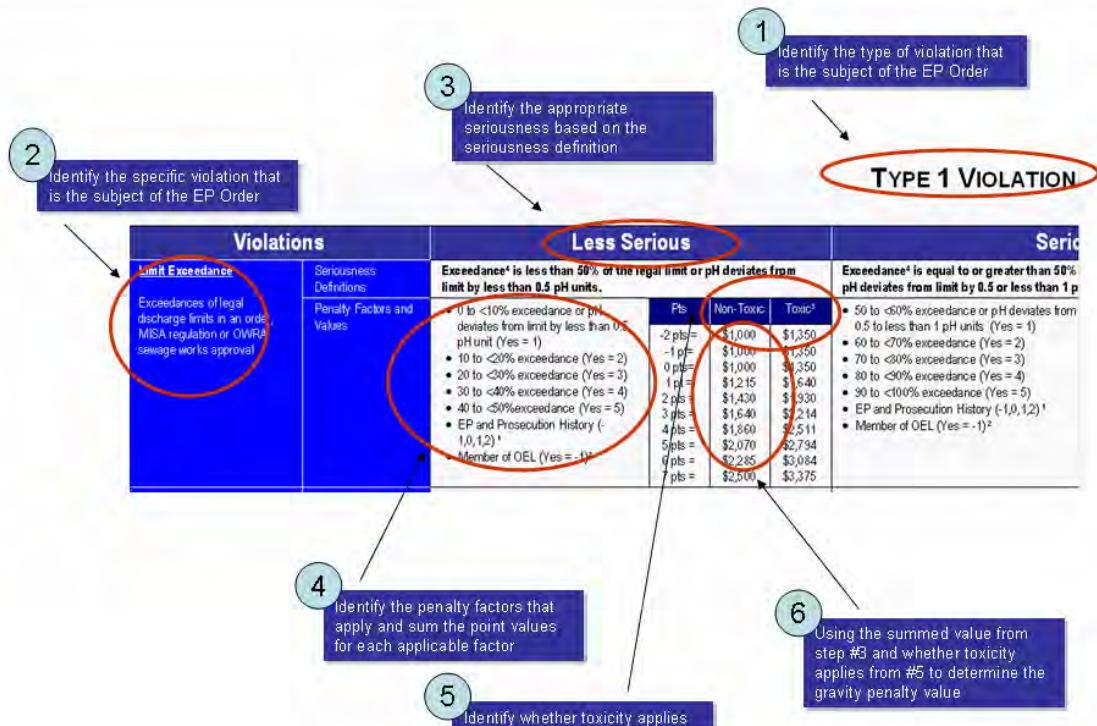
Item	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
	Provision of the Act	Description of the contravention	Circumstances	First date on which an environmental penalty may be ordered for the contravention	Type of contravention	Section of Regulation specifies type of consequence
6.	Subclause 106.1 (1) (b) (ii)	Contravention of a provision of an order or direction under the act, other than an order under section 84 of the act, an order of a court or a provision of an order or direction referred to in subclause 106.1 (1) (a) (iii) of the act.	The provision of the order or direction requires the regulated person to report a failure to comply with another provision of the order or direction that has the effect of establishing a numerical limit, including a limit of zero, on the amount, concentration or level of anything that may be discharged to the natural environment.	August 1, 2007	Type 1	14
7.	Subclause 106.1 (1) (b) (ii)	Contravention of a provision of an order under the act, other than an order under section 84 of the act, an order of a court or a provision referred to in subclause 106.1 (1) (a) (iii) of the act.	<ol style="list-style-type: none"> <li>1. The contravention is of a provision of an order or direction issued under section 16, 16.1, 16.2, 31, 32, 61, 91 or 92 of the act.</li> <li>2. In the case of an order issued under section 16 of the act, the order is issued in response to a contravention specified in this Table.</li> <li>3. The provision of the order or direction that was contravened relates to, <ul style="list-style-type: none"> <li>i. preventing, reducing or alleviating any impairment of the quality of water or the effects of any impairment of the quality of the water, or</li> <li>ii. the construction, installation or modification of any thing.</li> </ul> </li> </ol>	December 1, 2008	Type 2	14

Item	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6
	Provision of the Act	Description of the contravention	Circumstances	First date on which an environmental penalty may be ordered for the contravention	Type of contravention	Section of Regulation specifies type of consequence
8.	Subclause 106.1 (1) (b) (ii)	Contravention of a provision of an order under the act, other than an order under section 84 of the act, an order of a court or a provision referred to in subclause 106.1 (1) (a) (iii) of the act.	<ol style="list-style-type: none"> <li>1. The contravention is of a provision of an order or direction issued under section 16, 16.1, 16.2, 31, 32, 61, 91 or 92 of the act.</li> <li>2. In the case of an order issued under section 16 of the act, the order is issued in response to a contravention specified in this Table.</li> <li>3. The provision of the order or direction that was contravened is not a provision of an order or direction described in item 2, 6 or 7 of this Table.</li> </ol>	December 1, 2008	Type 1	14
9.-11.	REVOKE: O. Reg. 252/11, s. 8 (3).					
12.	Subclause 106.1 (1) (b) (iv)	Contravention of a provision of an agreement under subsection 106.1 (9) of the act.	N/A	August 1, 2007	Type 2	13, 14

## Appendix 3: Penalty Factor Tables

The figure below identifies the basic steps for determining the penalty value using the penalty factors in the following tables.

### Steps to Determine Penalty Value Based on Factors



### Table Definitions and Notes

1. EP and Conviction History of the plant subject to an EP order from the date of the violation that is subject to the EP order (with accompanying point values):
  - No convictions in previous 5 years, or no EP orders have been issued in previous 3 years (**-1 point**).
  - No convictions in previous 5 years or 3 or less EP based violations classified as less serious in previous 3 years, or no violations for which an EP order has been issued for the same type of violation in the previous 3 years (**0 points**).
  - 1 conviction in previous 5 years, 4 to 5 EP based violations classified as less serious in previous 3 years, 1 EP based violation or settlement agreement classified as serious/very serious in 3 years, or 1 violation for which an EP order has been issued for the same type of violation in the previous 3 years (**+1 point**).
  - 2 or more convictions in previous 5 years, 6 or more EP based violations classified as less serious in previous 3 years, 2 or more EP based violations or settlement agreements classified as serious/very serious in 3 years, or 2 or more violations for which EP orders have been issued for the same type of violation in the previous 3 years (**+2 points**).

2. OEL is Ontario's Environmental Leaders program – individual facilities must be members to qualify for a point reduction **(- 1 point)**.
3. The gravity penalty value for limit exceedances of toxic substances (as defined in the regulation) or spills/discharges of toxic substances (as defined in the regulation) that are s. 14 EPA or s. 30(1) OWRA violations are in this column ("toxic"). All gravity penalty values for discharges of non-toxic substances are in the "non-toxic" column.
4. Limit exceedance values are calculated as:  
% Exceedance =  $[(\text{Sample Value} - \text{Limit Value}) \div \text{Limit Value}] \times 100\%$

## TYPE 1 VIOLATIONS

Violations		Less Serious			Serious			Very Serious					
Limit Exceedance	Seriousness Definitions	Exceedance <sup>4</sup> is less than 50% of the legal limit or pH deviates from limit by less than 0.5 pH units.			Exceedance <sup>4</sup> is equal to or greater than 50% of the legal limit and less than 100%, or pH deviates from limit by 0.5 or less than 1 pH units			Exceedance <sup>4</sup> is equal to or greater than 100% of the legal limit or pH deviates from limit by 1 or more pH units					
Exceedances of legal discharge limits in an order, MISA regulation or an ECA pertaining to a sewage works approval (Table 2 – Items 3, 4, & 4.1)	Penalty Factors and Values	<ul style="list-style-type: none"> <li>0 to &lt;10% exceedance or pH deviates from limit by less than 0.5 pH unit (Yes = 1)</li> <li>10 to &lt;20% exceedance (Yes = 2)</li> <li>20 to &lt;30% exceedance (Yes = 3)</li> <li>30 to &lt;40% exceedance (Yes = 4)</li> <li>40 to &lt;50% exceedance (Yes = 5)</li> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Member of OEL (Yes = -1)<sup>2</sup></li> </ul>	Pts	Non-Toxic	Toxic <sup>3</sup>	<ul style="list-style-type: none"> <li>50 to &lt;60% exceedance or pH deviates from limit by 0.5 to less than 1 pH units (Yes = 1)</li> <li>60 to &lt;70% exceedance (Yes = 2)</li> <li>70 to &lt;80% exceedance (Yes = 3)</li> <li>80 to &lt;90% exceedance (Yes = 4)</li> <li>90 to &lt;100% exceedance (Yes = 5)</li> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Member of OEL (Yes = -1)<sup>2</sup></li> </ul>	Pts	Non-Toxic	Toxic <sup>3</sup>	<ul style="list-style-type: none"> <li>100 to &lt;110% exceedance or pH deviates from limit by 1 or more pH units (Yes = 1)</li> <li>110 to &lt;120% exceedance (Yes = 2)</li> <li>120 to &lt;130% exceedance (Yes = 3)</li> <li>130 to &lt;140% exceedance (Yes = 4)</li> <li>140 to &lt;150% exceedance (Yes = 5)</li> <li>&gt;150% (Yes = 6)</li> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> </ul>	Pts	Non-Toxic	Toxic <sup>3</sup>
Non-Discharge Legal Non-Compliance	Seriousness Definitions	Contravention does not result in an adverse effect or interfere with the ministry's capacity to protect and conserve the natural environment or have a potential to do either			Contravention interferes with the ministry's capacity to protect and conserve the natural environment, or has the potential to do so, but does not result in an adverse effect and does not have the potential to do so			Contravention results in an adverse effect or has the potential to do so					
Non-compliance with legal requirements not otherwise specified in this table. For example: <ul style="list-style-type: none"> <li>Reporting and record keeping (excluding S.92 EPA &amp; S.30(2) OWRA)</li> <li>Conditions of operation</li> <li>Constructing works (except when required in an order)</li> </ul> (Table 2 – Items 6, 7, 10, 12, 12.2 & 12.3)	Penalty Factors and Values	<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Member of OEL (Yes = -1)<sup>2</sup></li> </ul>	-2 pts = \$1,000 -1 pt = \$1,000 0 pts = \$1,000 1 pts = \$1,750 2 pts = \$2,500	<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Member of OEL (Yes = -1)<sup>2</sup></li> </ul>	<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Member of OEL (Yes = -1)<sup>2</sup></li> </ul>	<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Member of OEL (Yes = -1)<sup>2</sup></li> </ul>	<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Member of OEL (Yes = -1)<sup>2</sup></li> </ul>	<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Member of OEL (Yes = -1)<sup>2</sup></li> </ul>	<ul style="list-style-type: none"> <li>-2 pts = \$5,000</li> <li>-1 pt = \$5,000</li> <li>0 pts = \$5,000</li> <li>1 pts = \$7,500</li> <li>2 pts = \$10,000</li> </ul>	<ul style="list-style-type: none"> <li>-2 pts = \$5,000</li> <li>-1 pt = \$5,000</li> <li>0 pts = \$5,000</li> <li>1 pts = \$7,500</li> <li>2 pts = \$10,000</li> </ul>			

### Violations excluded from Type 1:

- Failure of a lethality limit (Type 2)
- Failure to report under s. 92 of the EPA or s. 30(2) of the OWRA (Type 2)
- Non-compliance with order provisions related to preventing, eliminating or ameliorating an adverse effect or constructing works (Type 2)
- Failure to comply with a settlement agreement (Type 2)
- Spills (s. 14 of the EPA or s. 30(1) of the OWRA) (Type 3)
- Failure to restore the natural environment (s. 93 of the EPA) (Type 3)

<sup>1,2,3,4</sup> See Table Definitions and Notes (pg. 42-43)

## TYPE 2 VIOLATIONS

Type of Violation		Less Serious		Serious		Very Serious	
<u>Lethality Failure</u>	Seriousness Definitions	Sample fails a legally required lethality limit test (i.e., <i>Daphnia magna</i> or Rainbow trout)		N/A		N/A	
Failure of a lethality limit (i.e., <i>Daphnia magna</i> or Rainbow trout acute lethality limit) (Table 2 – Item 8 & 12.1)	Penalty Factors and Values	<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Member of OEL (Yes = -1)<sup>2</sup></li> </ul> <p>-2 pts = \$10,000  -1 pt = \$10,000  0 pts = \$10,000  1 pts = \$12,500  2 pts = \$15,000</p>		N/A		N/A	
<u>Non-Discharge Legal Non-Compliance</u>	Seriousness Definitions	Contravention does not result in an adverse effect or interfere with the ministry's capacity to protect and conserve the natural environment or have a potential to do either		Contravention interferes with the ministry's capacity to protect and conserve the natural environment, or has the potential to do so, but does not result in an adverse effect and does not have the potential to do so		Contravention results in an adverse effect or has the potential to do so	
Non-compliance with legal requirements related to: <ul style="list-style-type: none"> <li>Reporting requirements under S.92 of the EPA or S.30(2) of the OWRA (Table 2 – Item 5)</li> <li>Order provision related to preventing, eliminating or ameliorating an adverse effect or constructing works (Table 2 – Item 11)</li> <li>Spill prevention and contingency plans (EPA s. 91.1) (Table 2 – Item 9)</li> <li>Non-compliance with abatement measures in a settlement agreement (Table 2 – Item 13)</li> </ul>	Penalty Factors and Values	<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Member of OEL (Yes = -1)<sup>2</sup></li> </ul> <p>-2 pts = \$10,000  -1 pt = \$10,000  0 pts = \$10,000  1 pts = \$12,500  2 pts = \$15,000</p>		<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Member of OEL (Yes = -1)<sup>2</sup></li> </ul> <p>-2 pts = \$20,000  -1 pt = \$20,000  0 pts = \$20,000  1 pts = \$25,000  2 pts = \$30,000</p>		<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> </ul> <p>-1 pt = \$40,000  0 pts = \$40,000  1 pt = \$50,000  2 pts = \$60,000</p>	
<u>Failure to Comply with a Settlement Agreement</u>	Seriousness Definitions	Regulated person took steps to implement all of the provisions of the agreement, but not within the time specified in the agreement.		The regulated person took steps to implement the provisions of the agreement, and those steps had some effect in preventing, eliminating or reducing the discharge of a material into the natural environment.		The regulated person failed to take any steps to implement the provisions of the agreement that would have had some effect in preventing, eliminating or reducing the discharge of a material into the natural environment.	
Failure to comply with beyond compliance measures in a settlement agreement (Table 2 – Item 13)	Penalty Factors and Values	<ul style="list-style-type: none"> <li>Delay is between 10% and 25% of the duration of the project (Yes = 1)</li> <li>Delay is between 25% and 50% of the duration of the project (Yes = 2)</li> <li>Delay is greater than 50% of the duration of the project (Yes = 3)</li> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> </ul>		<ul style="list-style-type: none"> <li>Partial or missed steps resulted in anticipated benefits being reduced by 25% to 50% (Yes = 1)</li> <li>Partial or missed steps resulted in anticipated benefits being reduced by more than 50% (Yes = 2)</li> <li>EP and Conviction History (-1,0,1,2)</li> </ul>		N/A	
						\$50,000	

### Violations excluded from Type 2:

- Limit exceedances (Type 1)
- Failure to report (other than s. 92 of the EPA or s. 30(2) of the OWRA), record keeping, condition of operation requirements and constructing works (other than required in an order) (Type 1)
- Spills (s. 14 of the EPA or s. 30(1) of the OWRA) (Type 3)
- Failure to restore the natural environment (s. of the 93 EPA) (Type 3)

<sup>1,2,3,4</sup> See Table Definitions and Notes (pg. 42-43)

## TYPE 3 VIOLATIONS

Type of Violation		Less Serious			Serious			Very Serious																		
<b>Spills</b>  s. 14 EPA (Pollution Prohibition) or s. 30(1) of the OWRA (Impair the Quality of Water) (Table 2 – Item 1)	Seriousness Definitions	The discharge is a contravention of s. 14 of the EPA or s. 30(1) of the OWRA, and is not classified as “serious” or “very serious”.			The contravention causes one or more of the following adverse effects:			The contravention causes or may cause one or more of the following effects:																		
		<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Member of OEL (Yes = -1)<sup>2</sup></li> </ul> <table border="1" style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th>Pts</th> <th>Non-Toxic</th> <th>Toxic<sup>3</sup></th> </tr> </thead> <tbody> <tr> <td>-2 pts = -1 pt = 0 pts = 1 pt = 2 pts =</td> <td>\$15,000 \$15,000 \$20,000 \$25,000</td> <td>\$20,250 \$20,250 \$27,000 \$33,750</td> </tr> </tbody> </table>			Pts	Non-Toxic	Toxic <sup>3</sup>	-2 pts = -1 pt = 0 pts = 1 pt = 2 pts =	\$15,000 \$15,000 \$20,000 \$25,000	\$20,250 \$20,250 \$27,000 \$33,750	<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Impacts are difficult to remediate (Yes = 1)</li> </ul> <table border="1" style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th>Pts</th> <th>Non-Toxic</th> <th>Toxic<sup>3</sup></th> </tr> </thead> <tbody> <tr> <td>-1 pt = 0 pts = 1 pt = 2 pts = 3 pts =</td> <td>\$30,000 \$30,000 \$36,667 \$43,333 \$50,000</td> <td>\$40,500 \$40,500 \$49,500 \$58,499 \$67,500</td> </tr> </tbody> </table>			Pts	Non-Toxic	Toxic <sup>3</sup>	-1 pt = 0 pts = 1 pt = 2 pts = 3 pts =	\$30,000 \$30,000 \$36,667 \$43,333 \$50,000	\$40,500 \$40,500 \$49,500 \$58,499 \$67,500	<ul style="list-style-type: none"> <li>Actual plant/animal mortality (Yes = 2)</li> <li>Actual human health impacts (Yes = 3)</li> <li>Actual injury or damage to animals is widespread (Yes = 2)</li> <li>Impacts difficult to remediate (Yes = 1)</li> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> </ul> <table border="1" style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th>Pts</th> <th>Non-Toxic</th> <th>Toxic<sup>3</sup></th> </tr> </thead> <tbody> <tr> <td>-1 pt = 0 pts = 1 pt = 2 pts = 3 pts = 4+ pts =</td> <td>\$60,000 \$60,000 \$70,000 \$80,000 \$90,000 \$100,000</td> <td>\$81,000 \$81,000 \$94,500 \$100,000 \$100,000 \$100,000</td> </tr> </tbody> </table>			Pts	Non-Toxic	Toxic <sup>3</sup>	-1 pt = 0 pts = 1 pt = 2 pts = 3 pts = 4+ pts =
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<b>Failure to Restore the Natural Environment</b>  s. 93 EPA (Failure to Restore the Natural Environment) (Table 2 – Item 2)	Seriousness Definitions	The regulated person did everything practicable to prevent, eliminate and ameliorate the adverse effects resulting from the spill and to restore the natural environment, but did not do so forthwith.			The regulated person took steps that had some effect in preventing, eliminating and ameliorating the adverse effects resulting from the spill or in restoring the natural environment.			The regulated person failed to take any effective steps to prevent, eliminate and ameliorate the adverse effects resulting from the spill or to restore the natural environment.																		
		<ul style="list-style-type: none"> <li>Delay initiation of restoration by more than 24 hours (Yes = 1)</li> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> </ul> <table border="1" style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th>Pts</th> <th>Non-Toxic</th> <th>Toxic<sup>3</sup></th> </tr> </thead> <tbody> <tr> <td>-1 pt = 0 pts = 1 pt = 2 pts = 3 pts =</td> <td>\$15,000 \$15,000 \$18,330 \$21,670 \$25,000</td> <td>\$20,250 \$20,250 \$24,745 \$29,254 \$33,750</td> </tr> </tbody> </table>			Pts	Non-Toxic	Toxic <sup>3</sup>	-1 pt = 0 pts = 1 pt = 2 pts = 3 pts =	\$15,000 \$15,000 \$18,330 \$21,670 \$25,000	\$20,250 \$20,250 \$24,745 \$29,254 \$33,750	<ul style="list-style-type: none"> <li>Less than 50% of impacts restored (Yes = 1)</li> <li>Unrestored impacts are widespread (Yes = 1)</li> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> </ul> <table border="1" style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th>Pts</th> <th>Non-Toxic</th> <th>Toxic<sup>3</sup></th> </tr> </thead> <tbody> <tr> <td>-1 pt = 0 pts = 1 pt = 2 pts = 3 pts = 4 pts =</td> <td>\$30,000 \$30,000 \$35,000 \$40,000 \$45,000 \$50,000</td> <td>\$40,500 \$40,500 \$47,250 \$54,000 \$60,750 \$67,500</td> </tr> </tbody> </table>			Pts	Non-Toxic	Toxic <sup>3</sup>	-1 pt = 0 pts = 1 pt = 2 pts = 3 pts = 4 pts =	\$30,000 \$30,000 \$35,000 \$40,000 \$45,000 \$50,000	\$40,500 \$40,500 \$47,250 \$54,000 \$60,750 \$67,500	<ul style="list-style-type: none"> <li>EP and Conviction History (-1,0,1,2)<sup>1</sup></li> <li>Unrestored impacts are widespread (Yes = 1)</li> </ul> <table border="1" style="margin-left: auto; margin-right: auto;"> <thead> <tr> <th>Pts</th> <th>Non-Toxic</th> <th>Toxic<sup>3</sup></th> </tr> </thead> <tbody> <tr> <td>-1 pt = 0 pts = 1 pt = 2 pts = 3 pts =</td> <td>\$60,000 \$60,000 \$73,330 \$86,670 \$100,000</td> <td>\$81,000 \$81,000 \$98,995 \$100,000 \$100,000</td> </tr> </tbody> </table>			Pts	Non-Toxic	Toxic <sup>3</sup>	-1 pt = 0 pts = 1 pt = 2 pts = 3 pts =
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### Violations excluded from Type 3:

- Limit exceedances (Type 1)
- Failure of a lethality limit (Type 1)
- Failure to report (other than s. 92 of the EPA or s. 30(2) of the OWRA), record keeping, condition of operation requirements and constructing works (other than required in an order) (Type 1)
- Failure to report under s. 92 of the EPA or s. 30(2) of the OWRA (Type 2)
- Non-compliance with order provisions related to preventing, eliminating or ameliorating an adverse effect or constructing works (Type 2)
- Failure to comply with a settlement agreement (Type 2)

<sup>1,2,3,4</sup> See Table Definitions and Notes (pg. 42-43)

## Appendix 4: Applying Modifiers

### 4.1 Preventive Measures Modifiers for Discharge Violations (s. 14 EPA, s. 30(1) OWRA, Limit Exceedances and Acute Lethality Failures)

Column 1 of Table A1 lists all the preventive measures that may be considered for spills as well as unlawful discharges from approved discharge points (i.e., limit exceedances) and acute lethality failures (i.e. *Daphnia magna*). Column 2 of Table A1 specifies which of these measures should be considered based on the violation type (i.e. spill, unlawful discharge from an approved discharge point or acute lethality failure).

For each consideration that has a “yes” answer, the appropriate point value from the last 3 columns is assigned. The point values represent the relative importance of the action in preventing the contravention.

Points are totalled and Table A2 is used, based on the violation type (i.e. spill, unlawful discharge from an approved discharge point or acute lethality failure), to determine the percentage reduction for the preventive measures taken by the regulated person.

TABLE A1

PREVENTIVE MEASURES	EP REGULATIONS SECTIONS (UNDER EPA AND OWRA)	APPLICABILITY	2 POINTS	1 POINT	0 POINTS
<b>1. Risk Analysis</b>					
a. The plant has conducted a documented risk assessment of the process/area where the incident occurred, where the risks were prioritized for future action to be taken.	16(1) 1 (EPA) 15(1)1 (OWRA)	All		Yes	No
b. The plant has documentation that actions were taken to reduce the risks identified.	16(1) 2 (EPA) 15(1)2 (OWRA)	All	Yes		No
<b>2. Preventive Maintenance</b>					
a. The plant has a preventive maintenance program specific to the process/area where the incident occurred.	16(1)3 (EPA) 15(1)3 (OWRA)	All		Yes	No

TABLE A1

PREVENTIVE MEASURES	EP REGULATIONS SECTIONS (UNDER EPA AND OWRA)	APPLICABILITY	2 POINTS	1 POINT	0 POINTS
b. The plant has documentation that preventive maintenance was performed as prescribed in the process/area where the incident occurred, as per industry and/or manufacturer recommended best practices (i.e. pressure testing of tanks, inspection of containment structures, pipe replacement, etc.)	16(1) 3 (EPA) 15(1)3 (OWRA)	All	Yes		No
<b>3. Containment Structures</b>					
a. Specific to the process/area where the incident occurred, the plant has permanent containment structures, as per industry best practices, that serve to prevent spilled contaminants from entering the natural environment.	16(1) 4 (EPA) 15(1) 4 (OWRA)	Spills Only	Yes		No
<b>4. Preventive Monitoring Systems</b>					
a. Specific to the process/area where the incident occurred, the plant has a system that warns operators of a potential unlawful discharge, and has documented procedures on the appropriate response to prevent an unlawful discharge.	16(1) 5 (EPA) 15(1) 5 (OWRA)	All		Yes	No
b. Specific to the process/area where the incident occurred, once the operators were alerted of a potential unlawful discharge, the plant responded as per documented procedures to prevent the discharge from occurring.	16(1) 5 (EPA) 15(1) 5 (OWRA)	All	Yes		No

TABLE A1

PREVENTIVE MEASURES	EP REGULATIONS SECTIONS (UNDER EPA AND OWRA)	APPLICABILITY	2 POINTS	1 POINT	0 POINTS
<b>5. Process and Pollution Control</b>					
a. Specific to the process/area where the incident occurred, the plant has the appropriate process control in operation, as per industry best practices, to prevent an unlawful discharge.	16(1) 6 (EPA) 15(1) 6 (OWRA)	Unlawful discharge from approved discharge point and acute lethality failures	Yes		No
b. Specific to the process/area where the incident occurred, the plant has pollution emission control equipment in operation, above and beyond legislated requirements, to prevent an unlawful discharge.	16(1) 6 (EPA) 15(1) 6 (OWRA)	Unlawful discharge from approved discharge point and acute lethality failures	Yes		No
<b>6. Training</b>					
a. Specific to the process/area where the incident occurred, the plant has documentation that it has trained personnel (including employees, contractors, and suppliers if applicable) on the prevention of unlawful discharges.	16(1) 7 (EPA) 15(1) 7 (OWRA)	All		Yes	No
<b>7. Other Preventive Actions<sup>1</sup></b>					
a. The plant has performed other actions, beyond those required by legislation that served to prevent the unlawful discharge (e.g. redundant systems, use of best available technology, preventive EMS components that have been implemented effectively, etc).	16(5) (EPA) 15(4) (OWRA)	All	Yes	Yes	No

<sup>1</sup> The Director has the discretion to apply a 1 or 2 point value for other preventive actions, if applicable, based on the effectiveness of the action in preventing the unlawful discharge

<b>TABLE A2</b> <b>PREVENTIVE MEASURES PENALTY REDUCTION:</b> <b>DISCHARGE VIOLATIONS</b>		
<b>Modifier Score: Spills</b>	<b>Modifier Score: Unlawful Discharge from Approved Discharge Point or Acute Lethality Failure</b>	<b>% Penalty Reduction</b>
<b>10 or more</b>	<b>12 or more</b>	<b>20%</b>
<b>8-9</b>	<b>10-11</b>	<b>16%</b>
<b>6-7</b>	<b>7-9</b>	<b>12%</b>
<b>4-5</b>	<b>4-6</b>	<b>8%</b>
<b>1-3</b>	<b>1-3</b>	<b>4%</b>
<b>0</b>	<b>0</b>	<b>0%</b>
<b>Max Score: 14 points</b>	<b>Max Score: 16 points</b>	

#### 4.2 Mitigative Measures Modifiers for Discharge Violations (s. 14 EPA, s. 30(1) OWRA, Limit Exceedances and Acute Lethality Failures)

Column 1 of Table B1 lists all the mitigative measures that may be considered for spills as well as unlawful discharges from approved discharge points (i.e. limit exceedances) and acute lethality failures (i.e. *Daphnia magna*). Column 2 of Table B1 specifies which of these measures should be considered based on the type of violation (i.e. spill, unlawful discharge from an approved discharge point or acute lethality failure).

For each consideration that has a “yes” answer, the appropriate point value from the last 3 columns is assigned. The point values represent the relative importance of the action in mitigating the contravention or future contraventions.

Points are totalled and Table B2 is used to determine the percentage reduction for the mitigative measures taken by the regulated person.

TABLE B1

MITIGATIVE MEASURES	EP REGULATIONS SECTIONS (UNDER EPA AND OWRA)	APPLICABILITY	2 POINTS	1 POINT	0 POINTS
<b>1. Implementation of a Spill Response Plan</b>					
a. The plant has demonstrated that their spill response plan was implemented in regards to having procedures and prescribed resources available (i.e. all prescribed equipment was available, procedures followed, etc.)	16(2) 1 ii & iv (EPA) 15(2) 1 ii & iv (OWRA)	Spills		Yes	No
b. The plant has developed and implemented a set of written procedures related to the identification and appropriate response to limit exceedances and acute lethality failures.	16(2) 1 iii (EPA) 15(2) 1 iii (OWRA)	Unlawful Discharge from an Approved Discharge Point and Acute Lethality		Yes	No
<b>2. Response</b>					
a. Measures were in place that identified the problem/incident immediately (i.e. overflow alarms, etc.) (if yes, skip consideration 2b)	16(2) 1 i (EPA) 15(2) 1 i (OWRA)	Spills or Unlawful Discharge from an Approved Discharge Point	Yes		No
b. Measures were in place that identified the	16(2) 1 i (EPA) 15(2) 1 i (OWRA)	Spills or Unlawful Discharge from an		Yes	No

TABLE B1

MITIGATIVE MEASURES	EP REGULATIONS SECTIONS (UNDER EPA AND OWRA)	APPLICABILITY	2 POINTS	1 POINT	0 POINTS
problem/incident within 1-2 hours.		Approved Discharge Point			
c. Once the incident was identified, a detailed cause analysis was conducted to determine the source of the violation.	16(2) 2 iii (EPA) 15(2) 2 iii (OWRA)	All		Yes	No
d. Once the incident was identified, mitigative measures were implemented swiftly and fully to rectify the problem as per industry best practices.	16(2) 2 i (EPA) 15(2) 2 i (OWRA)	All	Yes		No
e. Once the incident was identified, the plant employed additional monitoring and sampling (either on-site or off-site) to minimize risk to the environment and/or human health.	16(2) 2 ii (EPA) 15(2) 2 ii (OWRA)	All	Yes		No
f. Once the incident was resolved, a process was implemented to incorporate the lessons learned into future preventive actions (i.e. process changes, etc.). <sup>4</sup>	16(2) 2 iv (EPA) 15(2) 2 iv (OWRA)	Unlawful Discharge from an Approved Discharge Point and Acute Lethality	Yes		No
<b>3. Pollutant Containment and Recovery</b>					
a. Once the pollutant entered the natural environment (i.e. breached primary containment or process/pollution controls), the plant deployed the appropriate measures to contain the pollutant and prevent it from dispersing further into the natural environment.	16(2) 2 i (EPA) 15(2) 2 i (OWRA)	Spills	Yes		No

<sup>4</sup> This is a requirement for spills under the spill prevention and contingency plans regulation, and as a result credit is only given in instances where lessons learned are incorporated for an unlawful discharge from an approved discharge point (i.e., limit exceedance) or an acute lethality test failure.

TABLE B1

MITIGATIVE MEASURES	EP REGULATIONS SECTIONS (UNDER EPA AND OWRA)	APPLICABILITY	2 POINTS	1 POINT	0 POINTS
b. The plant took all practicable measures to recover the pollutants released into the natural environment.	16(2) 2 i (EPA) 15(2) 2 i (OWRA)	Spills	Yes		No
<b>4. Training</b>					
a. Specific to the process/area where the incident occurred, the plant has documentation that it has trained personnel (including employees, contractors, and suppliers if applicable) on the appropriate response to unlawful discharges.	16(2) 1 v (EPA) 15(2) 1 v (OWRA)	All		Yes	No
<b>5. Other Mitigative Actions<sup>5</sup></b>					
a. The plant has performed other actions, beyond those required by legislation that served to mitigate the unlawful discharge (e.g. use of best available technology, effective implementation of EMS components, etc.).	16(5) (EPA) 15(4) (OWRA)	All	Yes	Yes	No

<sup>5</sup> The Director has the discretion to apply a 1 or 2 point value for other preventive actions, if applicable, based on the effectiveness of the action in mitigating the unlawful discharge.

**TABLE B2****MITIGATIVE MEASURES PENALTY REDUCTION: DISCHARGE VIOLATIONS**

<b>Modifier Score: Spills</b>	<b>Modifier Score: Unlawful Discharge from Approved Discharge Point</b>	<b>Modifier Score: Acute Lethality Failure</b>	<b>% Penalty Reduction</b>
12 or more	10 or more	7 or more	10%
10-11	7-9	5-6	8%
7-9	5-6	3-4	6%
4-6	3-4	2	4%
1-3	1-2	1	2%
0	0	0	0%
Max Score: 16 points	Max Score: 14 points	Max Score: 11 points	

#### 4.3 Modifiers for s. 93 EPA Violations (Failure to Restore the Natural Environment)

Table C1 outlines the preventive and mitigative measures that may be considered when the violation is for s. 93 of the EPA (i.e., the regulated person fails to restore the natural environment).

For each consideration that has a “yes” answer, the appropriate point value from the last 3 columns is assigned.

The point values represent the relative importance of the action in preventing or mitigating the contravention. Points are totalled and Table C2 is used to determine the % reduction for the preventive and mitigative measures taken by the regulated person.

PREVENTIVE AND MITIGATIVE MEASURES	EP REGULATION SECTIONS (UNDER EPA)	TABLE C1		
		2 POINTS	1 POINT	0 POINTS
<b>1. Implementation of a Spill Response Plan</b>				
a. The plant has demonstrated that their spill response plan was implemented in regards to having procedures and prescribed resources available (i.e. all prescribed equipment is available, procedures followed, etc.)	16(3) 1ii & iii		Yes	No
<b>2. Response</b>				
a. Measures were in place that identified the problem/incident immediately (i.e. overflow alarms, etc.) (if yes, skip consideration 2b)	16 (3) 1 i	Yes		No
b. Measures were in place that identified the problem/incident within 1-2 hours.	16 (3) 1 i		Yes	No
c. Once the incident was identified, mitigative measures were implemented swiftly (i.e. promptly) in response, as per industry best practices. <sup>6</sup>	16(3) 2 i	Yes		No
d. Once the incident was identified, mitigative measures were implemented fully (i.e. all practicable was done to restore the natural environment), as per industry best practices. <sup>5</sup>	16(3) 2 i	Yes		No

<sup>6</sup> The answers to 2c and 2d are mutually exclusive – for there to have been a violation of s. 93, the regulated person would have failed to do 2c or 2d or both.

**TABLE C1**

PREVENTIVE AND MITIGATIVE MEASURES	EP REGULATION SECTIONS (UNDER EPA)	2 POINTS	1 POINT	0 POINTS
e. Once the pollutant entered the natural environment, the plant employed adequate monitoring and sampling to minimize any on-going risk to the environment and/or human health	16(3) 2 ii	Yes		No
<b>3. Pollutant Containment and Recovery</b>				
a. Once the pollutant entered the natural environment (i.e. breached primary containment or process/pollution controls), the plant promptly deployed the appropriate measures to contain the pollutant and prevent it from dispersing further into the natural environment.	16(3) 2 i	Yes		No
b. The plant took all practicable measures to recover the pollutants released into the natural environment.	16(3) 2 i	Yes		No
<b>4. Training</b>				
a. Specific to the process/area where the incident occurred, the plant has documentation that it has trained personnel (including employees, contractors, and suppliers if applicable) on the appropriate response to unlawful discharges.	16(3) iv		Yes	No

**TABLE C2****PREVENTIVE AND MITIGATIVE MEASURES PENALTY REDUCTION:  
S. 93 EPA VIOLATIONS**

Modifier Score	% Penalty Reduction
11 or more	30%
9-10	24%
6-8	18%
3-5	12%
1-2	6%
0	0%
Max Score: 15 points	

#### 4.4 Modifiers for Non-Discharge Violations

Tables D1 and D2 outline the preventive and mitigative measures that may be considered for all other non-discharge violations (excluding s. 93 of the EPA).

For each consideration that has a “yes” answer, the appropriate point value from the last 3 columns is assigned. The point values represent the relative importance of the action in preventing or mitigating the contravention.

Points are summed between Table D1 and D2, and the grand total is used to determine the percentage reduction, as indicated in Table D3, for the preventive and mitigative measures taken by the regulated person.

PREVENTIVE MEASURES	2 POINTS	1 POINT	0 POINTS
<b>1. Reducing Probability of Occurrence</b>			
a. Prior to the violation, the plant had implemented measures to reduce the probability of the violation occurring (i.e., policies, procedures, check lists, audits, etc.)	Yes		No

MITIGATIVE MEASURES	4 POINTS	2 POINTS	0 POINTS
<b>1. Voluntary Disclosure</b>			
a. The plant voluntarily disclosed the violation to the ministry, where the plant did not have a duty/requirement under law to do so.		Yes	No
<b>2. Response</b>			
a. Once the violation was identified, measures were implemented by the plant to swiftly correct the violation.	Yes		No
b. The plant implemented measures to prevent future reoccurrence of the violation.		Yes	No

TABLE D3	
PENALTY REDUCTION: NON-DISCHARGE VIOLATIONS	
Score = Preventive Measures (D1) + Mitigative Measures (D2)	
Modifier Score	% Penalty Reduction
8 or more	30%
6	22.5%
4	15%
2	7.5%
0	0%
Max Score: 10 points	

## **Appendix 5: Acronyms/Definitions Used In the Guideline**

“BCP” means beyond compliance project.

“CCPA” means the Canadian Chemical Producers’ Association.

“Compliance Policy” means Compliance Policy: Applying Abatement and Enforcement Tools (Policy) (May 2007) as amended from time to time.

“CSA” means the Canadian Standards Association.

“EBR” means the *Environmental Bill of Rights*, 1993, S.O. 1993, c. 28, as amended.

“ECA” means environmental compliance approval

“EMS” means environmental management system.

“EP” means environmental penalty.

“EP orders” means environmental penalty orders.

“EP Regulation” collectively refers to O. Reg. 222/07 and O. Reg. 223/07

“EPA” means the *Environmental Protection Act*, R.S.O. 1990, c. E. 19, as amended.

“ERT” means the Environmental Review Tribunal.

“IAFMRA” means the International Accreditation Forum Multilateral Recognition Arrangement

“IJM” means the Informed Judgment Matrix.

“Ministry” means the Ontario Ministry of the Environment.

“MISA” means Municipal Industrial Strategy for Abatement.

“NOI” means a notice of intention.

“OEL” means the Ontario Environmental Leaders Program.

“OWRA” means the *Ontario Water Resources Act*, R.S.O. 1990, c. O. 40, as amended.

“SCC” means the Standards Council of Canada.

“SPA” means a Special Purpose Account.